

No. 12944

United States
Court of Appeals
for the Ninth Circuit.

McNAIR REALTY COMPANY, a Corporation,
Appellant,

vs.

GAMBLE-SKOGMO, INC., a Corporation,
Appellee,

GAMBLE-SKOGMO, INC., a Corporation,
Appellant,

vs.

McNAIR REALTY COMPANY, a Corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Cross-Appellee.

In the District Court of the United States, District
of Montana, Great Falls Division

No. 1195

GAMBLE-SKOGMO, INC., a Corporation,
Plaintiff,

vs.

McNAIR REALTY COMPANY, a Corporation,
Defendant.

COMPLAINT

Plaintiff complains of defendant and for cause of
action alleges:

I.

Plaintiff, Gamble-Skogmo, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of Delaware, having its principal office and place of business in Minneapolis, Minnesota. Defendant, McNair Realty Company, is a corporation, organized and existing under and by virtue of the laws of the State of Montana, having its principal office and place of business at Great Falls, Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3000.00).

II.

On December 27, 1943, the defendant leased to the plaintiff a one-story building and basement situated on the West Half of Lot Eight (8) and on Lot Nine (9), Block Three Hundred Sixteen (316), Town or Townsite of Great Falls, Cascade County,

Montana, known as 521-523-525 Central Avenue, for the period from March 1, 1944, to and including the last day of February, 1954, by a [2*] written lease, a copy of which is hereto attached as "Exhibit A." Said lease provides in part:

2. "In consideration of the demise and leasing of the premises aforesaid by said Lessor, the Lessee agrees to pay to the Lessor at such place as shall be designated by the Lessor from time to time in writing or to such other Payee as the Lessor shall designate by written instrument duly acknowledged, as rental for said demised premises during said term a rental at the rate of Fifty-Four Hundred and No/100 Dollars (\$5400.00) per annum payable in equal monthly installments of Four Hundred Fifty and No/100 Dollars (\$450.00) each in advance on the first day of every month during said term beginning with the first day of March, 1944, plus two per cent (2%) on all net retail sales over Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) per lease year, had and obtained on the above-described premises."

III.

Thereafter, plaintiff took possession of said one-story building and occupied same under said lease, duly performing all the covenants therein contained binding upon it. Subsequently to the taking of possession, the plaintiff made certain net retail sales of farm equipment and other items which sales were

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

had and obtained elsewhere than on the above-described demised premises. The defendant claims that it is entitled to a rental of two per cent (2%) on all such sales and that, therefore, the plaintiff is indebted to the defendant for a sum of money in excess of Three Thousand Dollars (\$3000.00), exclusive of interest and costs, although the exact sum claimed by the defendant is not known to the plaintiff. The plaintiff denies these claims and contends that said sales of farm equipment and other items were not within the provision of Paragraph 2 of [3] said written lease hereinabove set forth.

IV.

The said written lease provides in part:

16. "If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the Lessee, it shall be lawful for the Lessor at the Lessor's election at any time thereafter while such default continues, to declare said term ended, and to reenter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants."

V.

On or about October 3, 1949, the defendant sent a letter by registered mail to the plaintiff advising it that "under Paragraph 16 of the lease, the term thereof is hereby declared terminated," a copy of which letter is hereto attached as "Exhibit B." The defendant claims that there is a default in the payment of rent and that it has elected to terminate the said written lease. The plaintiff claims that it has not defaulted in the payment of rent or in any of the covenants of said written lease. The plaintiff further contends that if this Court adjudges that the plaintiff has failed to comply with the provisions of said written lease, such failure was the result only of a honest and reasonable interpretation of said written lease, and the plaintiff is ready, willing and able to make full compensation [4] to the defendant for such failure if any exists.

VI.

On or about the 10th day of October, 1949, a demand was made upon the manager of plaintiff's store at the above-described demised premises that such manager immediately surrender possession of said premises, which demand was refused. After the 10th day of October, 1949, and before the 19th day of October, 1949, although the exact date is not known to the plaintiff, a letter was signed by the defendant and mailed to the plaintiff advising the plaintiff that "commencing October 3, 1949, your occupancy of the premises at 523 Central Avenue will be from day to day at the rate of \$300.00 per

day until McNair Realty Company has regained possession," a copy of which letter is hereto attached as "Exhibit C."

VII.

The plaintiff contends that the defendant is not entitled to possession of the said demised premises, that the said written lease is not terminated, that the plaintiff's occupancy of the premises is not on a day-to-day basis, and that the rate of Three Hundred Dollars (\$300.00) per day, as rental for the said demised premises, is unjust, unreasonable, and has not been agreed upon between the parties. The defendant denies these contentions of the plaintiff.

VIII.

The right of the plaintiff to continue and remain in possession of the above-described demised premises under said written lease is of great value to the plaintiff, namely, of the value of over Three Thousand Dollars (\$3000.00). [5]

IX.

The plaintiff disputes and denies each and all of the above-described claims and contentions made by the defendant and there is an actual controversy between the parties as to their legal rights and duties under said written lease and the facts hereinbefore stated.

Wherefore, plaintiff, as a party interested under said written lease of December 27, 1943, prays this Court for a declaration of the rights and duties of

the parties hereto under said written lease and the facts hereinabove set forth:

(a) As to whether the plaintiff owes the defendant any sum of money as rental;

(b) As to whether or not the plaintiff is in default of any of the covenants contained in said written lease;

(c) As to whether the said written lease is terminated and forfeited;

(d) As to whether the defendant is entitled to immediate possession of the said demised premises;

(e) As to the relationship under which the plaintiff now occupies said demised premises and the correct rental therefor.

And the plaintiff demands judgment determining in full the rights and duties of the parties hereto upon the matters in dispute hereinabove set forth and such further relief as is meet and proper in the premises.

CHURCH, HARRIS,
JOHNSON & WILLIAMS,

By /s/ CARTER WILLIAMS,
Attorney for Plaintiff. [6]

EXHIBIT "A"

Parties

This Indenture of Lease, in duplicate, made and entered into this 27th day of December, 1943, between McNair Realty Company, a Montana corporation of Great Falls, Montana, and Gamble-Skogmo, Inc., a Delaware corporation, having its principal office and place of business at 700 Washington Avenue North, Minneapolis, Minnesota, hereinafter called Lessee.

Premises

Witnesseth: That the Lessor in consideration of the covenants herein does hereby demise and lease unto the Lessee, the following described premises situated in the City of Great Falls, County of Cascade, and State of Montana, described as follows:

One-story building and basement, situated on the West Half of Lot Eight (8) and on Lot Nine (9), Block Three Hundred Sixteen (316), Town or Townsite of Great Falls, according to the map or plat thereof on file and of record in the office of the County Clerk and Recorder for Cascade County, Montana,

and known as 521-523-525 Central Avenue, together with the appurtenances thereto belonging, and means of ingress to and egress from said premises; for the purpose of selling merchandise at retail and other business that may be conveniently carried on in connection therewith.

Time is the essence of this lease and all the provisions hereof.

Term

1. The said demise and lease commences on the first day of March, 1944, and is to continue to and including the last day of February, 1954, being a period of ten (10) years, no months.

Possession

Possession of the premises shall be given to the Lessee on or before March 1, 1944, with rent accruing to the beginning date of the lease. [7]

Rental

2. In consideration of the demise and leasing of the premises aforesaid by said Lessor, the Lessee agrees to pay to the Lessor at such place as shall be designated by the Lessor from time to time in writing or to such other Payee as the Lessor shall designate by written instrument duly acknowledged, as rental for said demised premises during said term a rental at the rate of Fifty-Four Hundred and No/100 Dollars (\$5400.00) per annum payable in equal monthly installments of \$450.00 each in advance on the first day of every month during said term beginning with the first day of March, 1944, plus two per cent (2%) on all net retail sales over Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) per lease year, had and obtained on the above-described premises. No percentage will be paid on wholesale sales to employees

or sales or transfers of merchandise to other Gamble Stores.

Should Lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to the Lessor. Additional rental on the above is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) or on any general wholesale business done as provided for.

Renewal Privilege

It is agreed that the Lessee is not held responsible for any additional term beyond the expiration date of the lease because of failure to give notice of such intention. The Lessee may continue to occupy the premises beyond the expiration date, on the same terms and conditions as in this lease as a tenant at will, and which tenancy may be terminated and ended by either the Lessor or Lessee upon at least 60 days' written notice. Such tenancy, however, to end on the last day of a calendar month. [8]

Ownership and Possession Warranty

4. The Lessor or Lessor's agent expressly covenants that the Lessor is lawfully seized of the entire premises hereby demised and has good right and lawful authority to enter into this lease for the full terms aforesaid, or any extensions thereof, and will upon request of the Lessee immediately furnish the Lessee with proof satisfactory to Lessee in substantiation thereof. That the Lessor will put the Lessee

in actual possession of the hereby demised premises at the beginning of the term aforesaid, and that the said Lessee upon paying the said rent and performing and covenants herein agreed by it to be performed, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the said term.

5. The Lessor agrees that he will have done at his own expense but to the Lessee's reasonable satisfaction prior to the time of the beginning of the term of this lease any renovating or repairing which may be required to make said premises thoroughly sanitary and to put them in first class tenantable condition and any and all renovating and repairing, which the parties have agreed to be done by the Lessor. The Lessor shall keep the exterior and all structural portions of the demised premises including walls, foundations, roof, floors, ceilings, chimneys, ordinary and plate glass windows, rain spouting, and sidewalks in good order and repair and safe condition during the term of this lease or any extension thereof. Lessee will be required to replace any ordinary or plate glass windows broken by Lessee or through Lessee's acts. The Lessee is to make all necessary incidental repairs to the interior of said premises except the interior repairs, if any, which are agreed to be made by the Lessor prior to or after the [9] taking effect of this lease. It is expressly agreed and understood that should the Lessor neglect or refuse to make such repairs of such property as he agrees to make hereunder

within a reasonable time after notice that same are needed, the Lessee shall have the option of either having such repairs made and deducting the expense thereof from the rent payable by it or of vacating such premises, in which case this lease shall cease and come to an end, on account of the breach of such agreement to repair.

Repairs and Alterations

Repairs and improvements to be made by the Lessor prior to the commencement of this lease are as follows:

Remove present wood floor in the west fifty (50) feet, provide and lay an asphalt tile floor or similar quality material, colors according to Lessee's selection, in the front One Hundred Twenty (120) feet of this room first closing and flooring over the stair well to the basement in the front east side. Adjust heat radiators to Lessee's needs. Repair plastered walls and ceilings; relocate the wash sink, placing it on a rear wall or side wall at the rear; repair freight chute to basement, placing in good operating condition; repair the warped window sills in the front; place electric wiring in good condition to meet the Underwriter's code and repair all electrical outlets on both side walls and posts; finish inside of window transom with plaster board or some similar material. Decorate: paint ceiling and walls of first floor one coat with Gamble's Dura-Tone or a product of similar material, paint woodwork one coat of enamel,

all according to Gamble's standard design and colors. Remove the dividing partition wall on grade floor between 523-525 and finish floor and ceiling to match as near as possible.

Lessor will not be held liable for failure to comply with any of the above alteration requirements due to Government restrictions or War conditions. [10]

6. The Lessor further covenants that the premises hereby demised, the fixtures therein and appurtenances thereto (including the boilers, heating apparatus, elevators, stairways, fire escapes, pipes, wiring, awning frames, and all other service apparatus) will be delivered to the Lessee at the beginning of the term hereof in safe condition, good working order and repair. All said fixtures and appurtenances are to conform to the laws, ordinances, rules and regulations of duly constituted authorities. Lessor will, at the sole risk and expense of the Lessor, at all times during the term hereof: promptly comply with all laws, ordinances, rules and regulations applicable thereto, and supply all apparatus appliances and materials and complete all work in, upon and about the leased premises which may be required or ordered by law, or any lawful authority. Should the Lessor neglect or refuse so to do within a reasonable time after notice, the Lessee, without liability of forfeiture, may supply said apparatus, appliances and materials, complete said work and deduct the actual cost thereof from the rent thereafter falling due hereunder; provided, however, that this covenant shall not apply to or

embrace any fixtures and appurtenances installed by the Lessee, or repairs, alterations or improvements made by the Lessee in, upon and about said demised premises and as to all said installations and improvements the Lessee shall assume responsibility for compliance with the law. The Lessee will comply with all lawful requirements of the local Health Board, Police and Fire Departments, and municipal authorities respecting the manner in which it uses the leased premises. [11]

7. The Lessor agrees to furnish an adequate heating plant, equipment and apparatus in said demised premises of sufficient capacity to maintain seventy (70) degrees of heat throughout said demised premises. The Lessor agrees that he will keep the plumbing, heating plant, electric wiring, and other appurtenances whereby said demised premises are served in good, serviceable, and safe condition during the term of this lease, except through neglect or misuse by Lessee.

Heating

8. The Lessor agrees to furnish proper and sufficient heat for such demised premises whenever such heat is needed.

Heat, Water, Gas and Electricity

9. The Lessee will pay all charges made against said leased premises for gas, water and electricity furnished to the demised premises during the continuance of this lease, as the same shall become

due at the rate charged therefor by the public or utility corporation furnishing such service. Any charges for and heat furnished to the demised premises which the Lessor has agreed herein to pay or furnish may, in the event of his failure to furnish or pay the same when due, be paid by the Lessee and deducted by it from the rent payable hereunder. In addition, the Lessee agrees to pay garbage collection charges assessed against these premises by the City of Great Falls for services rendered.

Fire Clause

10. In the event the leased premises be damaged by fire, earthquake, or other casualty, they shall be promptly repaired by the Lessor, and an abatement shall be made from the rent corresponding with the time during which and the extent to which they may not be used by the Lessee after damage occurring as aforesaid, [12] and before repair. In the event of the total destruction of the said premises by fire, earthquake, or other casualty this lease shall cease and come to an end, and the Lessee shall be liable for rent only up to the time of such destruction. In the event of a partial destruction of said premises such as to render them unsuitable for the business of the Lessee, then at its option this lease shall cease and come to an end, and the Lessee shall be liable for the rent only up to the time of such partial destruction of said premises such as to render them unsuitable for the business of the Lessee, then at its option this lease shall cease and come to an end, and the Lessee shall be liable for

the rent only up to the time of such partial destruction of the leased premises. In the event of the occurrence of either of the two contingencies last mentioned the Lessee shall be entitled to receive a prorata refund out of any advance rent paid by it for the rent period during which such premises are untenable on account of such injury or destruction.

Sublet Clause

11. The Lessee may not let or underlet the whole or any part of said demised premises.

Surrender of Premises

12. At the expiration of said term, Lessee will quit and surrender the premises hereby demised in as good state and condition as received, reasonable wear and tear and damage by fire or the elements or from other causes beyond its control excepted. In the event the Lessee is to vacate the premises at the expiration of this lease, or any renewals thereof, the Lessee at his option shall be allowed to occupy the premises for not more than thirty (30) days after the expiration date of this lease, and shall pay the Lessor rental for the proportional part of the month so occupied at a rate in [13] [Printer's Note: Balance of paragraph missing in copy.]

Access to Premises

13. Lessor will have reasonable access during business hours to the premises hereby leased for the purpose of examining and exhibiting of said premises, or to make any needful repairs or altera-

tions of said premises, which said Lessor may see fit to make; but the examining and exhibiting of said premises, and any repairs or alterations to be made by Lessor, shall not in any manner interfere with the business of the Lessee but shall be done during the regular business hours of Lessee unless otherwise agreed upon by the parties hereto. Lessor will also be allowed to have placed upon said premises during a period of thirty (30) days prior to the expiration of this lease, in the usual form and in a suitable place a "To Rent" or "To Let" sign, and the Lessee will not interfere with same.

Removal of Fixtures

14. The Lessee shall have the right at the expiration of this lease or any extension thereof to remove any and all fixtures, shelving, exterior signs, or such equipment which it may have installed and paid for in said premises, the same to be removed, however, with as little damage to the building as possible.

The following electric light fixtures, now in the building, are the property of the Lessor: None; store light fixtures and window light fixtures: None.

Signs and Painting Front

15. The Lessee shall have the right to paint the store front with its own colors, and at the termination of this lease, Lessee shall have the right to repaint the store front in its original colors or some other color not similar to Lessee's regular colors,

and as may be satisfactory to the Lessor. Lessee shall have the right and privilege of installing necessary and usual trade signs on the herein demised premises including an [14] [Printer's Note: Balance of paragraph missing in copy.]

Termination of Lease

16. If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the Lessee, it shall be lawful for the Lessor at the Lessor's election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants. If at any time during the term of this lease, or any renewal thereof, there shall be enacted or promulgated any so-called "anti-chain store" legislation or governmental regulations applicable in terms to the Lessee in connection with the business transacted by it on the demised premises (including any statute, ordinance, or other legislation or any regulation purporting to impose a tax, fee, or requirement in connection with such business additional in amount and kind to that which would have been applicable

if the Lessee operated only the demised premises) then, and in either of such events, the Lessee may at its option terminate this lease upon ninety (90) days' written notice to the Lessor. This optional right to terminate the lease shall not be affected by pending proceedings challenging the validity of such legislation or regulations nor by any determination that the same are invalid excepting only that no such notice of termination [15] shall be served after a final determination of invalidity by the highest court of the state in which the demised premises are located or by the United States Supreme Court.

In the event that the Lessor can deliver the premises prior to March 1, 1944, the Lessee will accept same upon ten days' advance written notice, on the first or fifteenth of any month. In the event of occupancy by the Lessee prior to March 1, 1944, such term shall be considered as a separate accounting period on a pro rata basis, the lease years being understood to start March 1, 1944.

Lessor agrees to absorb one-half of the actual rental loss from March 1, 1944, on the premises now occupied by the Lessee under its lease with Victor Ario and Joseph Wright at 619 Central Avenue, Great Falls, Montana.

Write Special Clauses Here

Lessee may cancel this lease and all of its provisions and obligations thereunder as of February 28, 1949, by giving a written notice six months in advance of this cancellation date and making a cash settlement with the Lessors in the amount of

\$5,400.00; Lessee may cancel this lease and all of its provisions and obligations thereunder as of February 28, 1950, by giving a written notice six months in advance of this cancellation date and making a cash settlement with the Lessors in the amount of \$4,320.00; Lessee may cancel this lease and all of its provisions and obligations thereunder as of February 28, 1951, by giving a written notice six months in advance of this cancellation date and making a cash settlement with the Lessors in the amount of \$3,240.00; Lessee may cancel this lease and all of its provisions and obligations thereunder as of February 29, 1952, by [16] giving a written notice six months in advance of this cancellation date and making a cash settlement with the Lessors in the amount of \$2,160.00; Lessee may cancel this lease and all of its provisions and obligations thereunder as of February 28, 1953, by giving a written notice six months in advance of this cancellation date and making a cash settlement with the Lessors in the amount of \$1,080.00.

Lease Binding on Heirs, etc.

Each and every provision of this lease shall bind and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of the respective parties hereto. Masculine pronouns shall be construed as feminine or neuter pronouns and singular pronouns and verbs shall be construed as plural in any place or places herein in which the context may require such construction.

Lease Covers All Obligations

This lease covers in full each and every obligation of every kind or nature whatsoever from the Lessee to the said Lessor concerning the premises hereby demised, no verbal agreements shall be held to vary the provisions hereof, any statute, law, or custom of the State in which said premises are situated to the contrary notwithstanding.

When signed by the proposed Lessor this document shall constitute an offer to Gamble-Skogmo, Inc., on the terms and conditions herein set forth, which may be accepted by Gamble-Skogmo, Inc., by execution of this instrument by its officers. This offer by Lessor shall expire, 19.....

In Witness Whereof the parties hereto have executed this instrument in duplicate the day and year [17] first above written.

[Seal] McNAIR REALTY COMPANY,

By /s/ C. S. McNAIR,

By /s/ B. P. McNAIR,

Lessor, Sec.-Treas.

[Seal] GAMBLE-SKOGMO, INC.,

By /s/ P. W. SKOGMO,

Its President.

By /s/ M. O. WEIBY,

Its Secretary,

Lessee.

Witness:

/s/ C. L. McPHERSON,

/s/ E. L. McPHERSON,

As to Lessor.

/s/ M. F. HOBEN,

/s/ B. A. GREEN,

Prepared by: MFH.

Submitted for approval by: MFH. [18]

EXHIBIT "B"

Law Offices of
Hall and Alexander
Strain Building
Great Falls, Montana

October 3, 1949

H. Cleveland Hall,
Edw. C. Alexander,
Howard C. Burton.

Gamble-Skogmo, Inc.,
700 Washington Avenue North,
Minneapolis, Minnesota.

Gentlemen:

McNair Realty Co. of this City has turned over to us for our attention the controversy which has existed for several months between you and the McNair Realty Co. concerning the rents payable under your lease dated December 27, 1943. The provisions of the lease are clear. According to such provisions, and, indeed, by your own admissions you have failed for the past year or more to pay

the rental due or to make proper accounting to the McNair Realty Co. for sales made by you. Correspondence has availed nothing. We are, therefore, directed to advise you that, under paragraph 16 of the lease, the term thereof is hereby declared terminated. In the immediate future, without further notice, McNair Realty Co. will re-enter the premises pursuant to paragraph 16 for the purpose of remodeling the same for rental to others. Action for rentals due will thereafter be filed. Please govern yourself accordingly.

Very truly yours,

HALL AND ALEXANDER,

By /s/ H. C. HALL.

HCH:ekm

Registered

Return Receipt Requested. [19]

EXHIBIT "C"

Gamble-Skogmo, Inc.,
15 North Eighth Street,
Minneapolis, Minnesota.

Gentlemen:

On October 10th, 1949, demand was made upon Mr. Dale Cockayne, your manager at Great Falls, Montana, for the immediate surrender of the premises now occupied by you in Great Falls under the former lease between McNair Realty Company and Gamble-Skogmo, Inc., dated December 27th, 1943, which was terminated October 3rd, 1949. Copy of

such demand is herewith enclosed for your information.

Your manager refused to surrender possession as demanded. This is to advise you that commencing October 3rd, 1949, your occupancy of the premises at 523 Central Avenue will be from day to day at the rate of \$300.00 per day until McNair Realty Company has regained possession.

Yours very truly,

McNAIR REALTY COMPANY,

By /s/ C. S. McNAIR,
President.

[Endorsed]: Filed November 1, 1949. [20]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant above named, McNair Realty Company, a corporation, and, for its Answer to the Complaint of plaintiff, admits, denies and alleges:

I.

Answering paragraph I, defendant admits that plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal office and place of business in Minneapolis, Minnesota. Admits that defendant is a corporation organized and existing under and by virtue of the laws of Montana, hav-

ing its principal office and place of business at Great Falls, Montana. Denies that there is any controversy between plaintiff and defendant concerning the matters set forth in plaintiff's Complaint, or that any matter in controversy between plaintiff and defendant exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

Admits the allegation of Paragraph II of said Complaint and alleges that said lease further provided: [21]

"No percentage will be paid on wholesale sales to employees or sales or transfers of merchandise to other Gamble Stores.

"Should Lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to the Lessor. Additional rental on the above is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and no/100 Dollars (\$270,000.00) or on any general wholesale business done as provided for."

Said lease was prepared by said plaintiff upon its own printed form G-404 B, and the language therein contained is the language of plaintiff.

III.

Answering paragraph III, defendant admits that plaintiff entered into the possession of the leased premises on or about the 1st day of March, 1944,

and remained in possession thereof under said lease until on or about the 3rd day of October, 1949, upon which day said lease was terminated. Denies that said plaintiff duly or otherwise performed all of the covenants in said lease binding upon it, and in this behalf defendant alleges that plaintiff failed, refused and neglected to make and deliver to defendant a full, true or correct accounting, quarterly or otherwise or at all, covering the net retail sales or general wholesale business done by plaintiff as provided for in said lease, although such accounting was many times demanded by defendant. Instead, over the written and oral protests of defendant, plaintiff furnished to defendant false, incomplete and incorrect so-called quarterly accountings of such sales which were, from time to time, rejected by defendant. By reason of such arbitrary and unreasonable breach by plaintiff of the terms and covenants of said lease on its part to be performed, defendant was unable to ascertain the true and correct amount of rental to be paid by plaintiff under the terms of said lease until the 24th day of October, 1949, upon which date the deposition of Dale Cockayne, manager for plaintiff of plaintiff's [22] Great Falls store was taken and his testimony perpetuated under the provisions of Sections 10687 to 10692 of the Revised Codes of Montana, 1935. By the testimony of said Cockayne, and the records of plaintiff introduced in evidence as a part of said deposition, it was disclosed that plaintiff was indebted to defendant for rental for the period 1947,

1948 and 1949 to October 19, 1949, in a sum in excess of \$5,161.00. Defendant admits that subsequent to March 1, 1944, and particularly during the years 1947, 1948 and 1949 plaintiff made net retail sales of farm equipment and other items, but specifically denies that said sales were had and obtained elsewhere than on the premises described in said lease, and in this behalf defendant alleges that said farm equipment and other items were advertised for sale by Gambles Store located upon said premises; the greater part of the sales of such equipment and items were initiated and consummated on said premises; all sales slips, contracts and moneys were handled by the business office located in said premises; all sales were made under the supervision of the manager of said store; and, said farm equipment and other items was treated and considered by plaintiff as a unit or department of its store located upon said premises, all as shown and disclosed by the records of plaintiff introduced in evidence in the deposition of Dale Cockayne, aforesaid. Admits that defendant claimed and now claims that it is entitled to an additional rental by reason of such sales, and that, therefore plaintiff is indebted to the defendant in a sum of money in excess of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs. Denies that the exact sum claimed by defendant is not known to plaintiff. Specifically denies that plaintiff denies such claim of defendant, or that plaintiff contends that said sales of farm equipment and other items were not within the provisions of paragraph 2 of said lease,

and in this behalf defendant alleges that on or about the 24th day of October, 1949, the said plaintiff offered to pay to said defendant the sum of \$5,161.60 as and for [23] additional rental due defendant by reason of retail sales of such farm equipment and other items, which offer was by said defendant accepted, and that no controversy now exists or existed at the time of the filing of plaintiff's complaint with respect to such matter. Said sum of \$5,161.60 has not been paid by plaintiff to defendant.

IV.

Admits the allegations of paragraph IV.

V.

Admits that on October 3, 1949, the defendant sent a letter by registered mail to the plaintiff advising plaintiff that "under paragraph 16 of the lease, the term thereof is hereby declared terminated," a copy of which letter is attached to plaintiff's complaint as Exhibit "B." Admits that defendant has claimed and now claims that there has been for more than a year and that there now is a default in the payment of rent, and that it has declared said lease terminated, and in this behalf defendant alleges that on October 24, 1949, at Great Falls, Montana, the plaintiff was informed by defendant that said lease had been terminated and was no longer in force and effect; that defendant desired possession of the premises; that defendant desired immediate payment of the amount due it as additional rental for the premises described in said

•

lease; and that upon such payment by plaintiff to defendant, the defendant would consider negotiating with plaintiff for a new lease upon the premises. Plaintiff agreed to pay to defendant the rental due to defendant as disclosed by plaintiff's records in the amount of \$5,161.60. Thereupon plaintiff and defendant entered upon negotiations with respect to a new lease upon said premises. Such negotiations continued during the period October 24th, 25th, 26th, 27th and 28th. All of the terms of the new lease had been agreed upon on October 28th save and except the minimum rental to be paid by plaintiff to defendant. The representative of plaintiff who was conducting such negotiations then advised defendant that he would go to Minneapolis for [24] a meeting Saturday morning, October 29th, at which meeting he expected to iron out the minimum rental matter and that he would return to Great Falls on Monday, October 31st, and consummate said lease or resume negotiations on said rental matter. Said representative, William T. Hill by name, went to Minneapolis on October 28th and attended said meeting, but failed to return to Great Falls. On November 1st, the present action was filed and on November 1st at 4:19 p.m., the said Hill sent the following telegram to defendant:

“Proposals unsatisfactory therefore negotiations must cease.”

Under the facts set forth above, said plaintiff cannot and does not in good faith claim or assert that it has not defaulted in the payment of rent or of the other covenants of said lease dated December

27, 1943. Such claims and assertions are now foreclosed by the voluntary actions and admissions of the plaintiff. Nor can plaintiff now claim or assert in good faith that its defaults were the result "only of an honest and reasonable interpretation of said written lease." The defendant further alleges that the allegation that, "plaintiff is ready, willing and able to make full compensation to the defendant for such failure if any exists," is not made in good faith for the reason that plaintiff has heretofore agreed to pay to defendant the sum of \$5,161.60 for rental due defendant, but now refuses to pay such agreed sum or any part thereof.

VI.

Admits the allegations of paragraph VI.

VII.

Answering paragraph VII, defendant denies that plaintiff makes and alleges that plaintiff cannot, in good faith, make the contentions set forth in said paragraph. Defendant further alleges that under the facts set forth in this answer there is no occasion for defendant to deny any such purported and fictitious contentions. [25]

VIII.

Denies the allegations of paragraph VIII.

IX.

Denies the allegations of paragraph IX. Defendant alleges that there is not any actual or justiciable controversy between plaintiff and defendant con-

cerning any of the matters set forth in said complaint or in the prayer thereof which this Court has the power or jurisdiction to adjudicate.

Wherefore, defendant prays judgment as follows:

1. That said action be dismissed upon the merits.
2. That defendant have and recover of and from the plaintiff, defendant's costs and disbursements incurred in and by reason of this action.

H. C. HALL,

EDW. C. ALEXANDER,

HOWARD C. BURTON,

Attorneys for Defendant.

Service admitted.

[Endorsed]: Filed November 4, 1949. [26]

[Title of District Court and Cause.]

OPINION

A declaratory judgment is sought in this suit with the purpose also of obtaining other relief and determining the relations of the parties under that certain written lease and agreement entered into between the plaintiff and defendant on December 27, 1943, by which the latter leased to the former those certain premises consisting of a one-story building and basement located at Nos. 521-523-525 Central Avenue, in the City of Great Falls, Cascade County, State of Montana, and further de-

scribed as having a frontage of seventy-five feet on Central Avenue; and such lease was made for the purpose of enabling the plaintiff to carry on a general mercantile business and to maintain and conduct on said premises a general department store.

The plaintiff had heretofore been engaged generally in the merchandising business and the defendant in conducting a real estate business. This is known as a percentage lease, and the plaintiff was to have possession of the premises on March 1, 1944, and continue thereunder for a period of ten years, the lease expiring by its terms on the last day of February, 1954; there was provision therein for a minimum base rental of \$5,400.00 per year, which was payable "in equal monthly installments of \$450.00 each in advance on the first day of every month during said term, beginning with the first day of March, 1944, plus two per cent (2%) on all net retail sales over Two Hundred Seventy Thousand and no/100 Dollars (\$270,000.00) per lease year, had and obtained on the above-described premises. No percentage will be paid on wholesale sales to employees or sales or transfers of [389] merchandise to other Gamble Stores. Should lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to the lessor. Additional rental on the above is to be paid on a quarterly accounting, based on annual net retail sales (of) Two Hundred Seventy Thousand and no/100 Dollars (\$270,000.00)

or on any general wholesale business done as provided for.”

Aside from the quotation from paragraph 2 of the lease the next paragraph thereof which requires special attention is number 16, which reads in part as follows: “If default be made by lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the lessee, it shall be lawful for the lessor at the lessor’s election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies that might otherwise be used for arrears of rent or preceding breach of covenants. * * *”

Large sums of money were expended by both parties for remodeling and improvements, and thereafter the net retail sales increased, and aside from the regular rental payments each month the defendant received increased rental payments under the percentage clause of the lease. However, there were certain sales of farm implements and equipment made by lessee upon which the two per cent rental payment was never made, and which lessor claims were improperly withheld in violation of the express terms of the lease, and this

affords the principal cause of contention in this suit. The lessee asserts that the sales of farm implements and equipment were conducted from a building across the alley and on a separate lot from the department store on Central Avenue, and was established as a separate and distinct business that was not in contemplation by the parties at the time [390] the lease was executed and constituted no part of the rental agreement and therefore could not be included in the net retail sales to which the percentage clause applied. The lessor claims that all such retail sales were "had and obtained on the above-described premises," according to the evidence and terms of the lease, and the argument advanced in support of this contention in general is that the only Gamble Store operated in Great Falls was the department store at 521-523-525 Central Avenue and was conducted by one manager, who had charge of unit No. 5 of the store for sale of farm equipment, all advertising, display in store, approved credit sales and received all money. From the department store customers were taken to the place or places of storage of farm equipment, except when such implements or equipment were on display in the store, and in furtherance of the claim that sales made of farm implements and equipment were as much "had and obtained" upon the premises at the above numbers as any other sales made in the usual course of business, counsel for lessor has submitted a clear and succinct statement of the evidence in his brief which lends support to his argument. The evidence as shown by the statement

referred to and by the transcript is so plain and convincing that there seems to be no question how and where the sales and disposition of agricultural implements and accessories were "had and obtained."

Although counsel argue that farm equipment sales were not in contemplation at the time the lease was signed, there seems to be no point to that argument; the parties agreed to a percentage rental on all retail sales above \$270,000.00; there was no specification of sales of any particular kind or description of property sold, or to be sold, to which the rent would apply apart from the general provision. Without further discussion of this subject the court is of the opinion that there should have been included in computing the 2% on all retail sales over \$270,000.00. the amount of sales of farm implements and accessories; and to that extent the plaintiff would be indebted to defendant for additional rental.

The negotiations for a compromise of the difficulties the parties were encountering fills a good part of the transcript in this case; objections were made to the introduction of evidence [391] relating to this attempted compromise, and the evidence was allowed to be taken subject to objection; the court has gone over carefully the evidence of this effort to effect a compromise, which ended in failure, and is now of the opinion that all evidence relating to this subject should be excluded from the case, and such is the order of court herein. It would appear from the provisions of the statute and authorities (R.C.M. 1947, 93-2201-3) that evidence of com-

promise negotiations should not be admitted. Whatever the agreements or disagreements of the parties were in respect to the proposals of compromise it is in evidence that no settlement occurred. (*Huffine v. Lincoln*, 53 Mont. 474.) In the strict sense of the word there does not appear to have been any material independent facts disclosed not having some relation to the negotiations for compromise.

In this cause plaintiff seeks from the court a declaration "of the rights and duties of the parties hereto under said written lease and the facts hereinabove set forth"; whether plaintiff owes defendant any rental; whether plaintiff is in default of the covenants; whether the lease is terminated and forfeited; whether defendant is entitled to immediate possession of said premises. How far can the court go in determining the questions submitted by plaintiff under the provisions of the Federal Declaratory Judgment Act, and the authorities relating to it, in this suit?

The statutory authority to render declaratory judgments permits federal courts by a new form of procedure to exercise the jurisdiction to decide cases or controversies, both at law and in equity, which the judiciary acts had already conferred. (*Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227.) It is provided in the Declaratory Judgment Act that a declaration of rights may be awarded although no further relief be sought, and it is also provided therein that "further relief based on a declaratory judgment or decree may be granted whenever neces-

sary or proper." The following case is an authority in point:

"The jurisdiction of the District Court in the present suit praying an adjudication of rights in anticipation of their threatened infringement, is analagous to the equity jurisdiction in suits quia timet or for a decree quieting title. See *Nashville, C. & [392] St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 263. Called upon to adjudicate what is essentially an equitable cause of action, the District Court was as free, as in any other suit in equity, to grant or withhold the relief prayed, upon equitable grounds. The Declaratory Judgment Act was not devised to deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles." (*Great Lakes Co. v. Huffman*, 319 U. S. 293, 300.)

It appears to be well established that the discretion to grant or refuse declaratory relief should be liberally exercised to effectuate purposes of the Declaratory Judgment Act and thereby afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. The remedy should not be accorded to try a controversy by piecemeal, to try particular issues without settling the entire controversy, or to interfere with an action already instituted. (*Aetna Casualty & Surety Co. v. Quarles*, 92 F.(2) 321; *Jud. Code* 274(d), 28 U.S.C.A. 400.) In another case it was held that the pleader may join claims for a declaration of

rights and claims for personal coercive relief. "It is not improper for a pleader under the Federal Rules of Civil Procedure to combine in one complaint a request for a declaration and for some coercive relief. Nor is it improper for a District Court to render a judgment or judgments granting both forms of relief." (Chase Nat. Bank v. Citizens Gas Co., 113 F.(2) 217, 230.) As illustrative of a controversy or dispute under the provisions of the Act, see Aetna Life Ins. Co. v. Haworth, 300 U. S. 227-242; Lehigh Coal & Navigation Co. v. Central R. of New Jersey, 33 F. Supp. 362-365; F. X. Hooper Co. v. Samuel M. Langston Co., 56 F. Supp. 577, 583.

A serious question relates to the alleged termination of the lease, and the construction and application of the forfeiture clause contained therein to the state of facts presented here. Defendant contends that it is entitled to a forfeiture because of the default of the plaintiff in payment of percentage rentals [393] on retail sales of farm equipment, percentage rentals on wholesale sales and in failure to furnish complete accounts and reports. The real bone of contention seems to be over the failure to pay the percentage rental on sales of farm equipment wherein a controversy has existed for some time over the right of lessor to claim it, and for the determination of which this suit under the declaratory judgment act was instituted.

The plaintiff is conducting an established general merchandising business, with expanding operations and constantly increasing sales upon which the per-

centage rental applies, thereby increasing the rentals due the landlord as was contemplated by the parties in adopting this form of rental payments when the lease was executed. Many thousands of dollars have been expended by both lessor and lessee to equip the department store and to provide adequate facilities for its expanding business, and it would appear that both parties would suffer a severe loss if this lease were terminated, and the damage and inconvenience to plaintiff on a forced removal from the premises would be difficult to estimate, which is separate and apart from the probable loss to numerous wage earners who might lose employment.

Much has been said in the briefs on the subject of waivers, plaintiff claiming that the acceptance of rental payments after defendant had notified plaintiff of the termination of the lease amounted to a waiver; the payments referred to were the regular monthly rental of \$450.00 for October, 1949, and the quarterly rental of 2% on sales exceeding \$270,000.00 extending through August, 1949. The law generally seems to be that where any recognition is given to the existence of a tenancy after notice of termination of the lease or right of entry has accrued, wherein the lessor has notice of the forfeiture, will have the effect of a waiver of the landlord's right to a forfeiture of the lease; it was further held that slight acts on the part of lessor may be sufficient to effect a waiver. (32 Am. Jur. Sec. 882; 52 C.J.S. Sec. 724; Model Dairy Co. v. Foltis-Fischer, 67 F.(2) 704; Woollard v. Schaffer

Stores Co., Inc., 272 N. Y. 304.) But on the other hand, it appears that the \$450.00 rent for October, 1949, was due and payable the first of the month and the quarterly payment of 2% was due and [394] payable at the end of the August quarter, so that if such payments were made after the notice of termination of the lease, when both were due before that date, and received "on account" by defendant, it might indicate an intent on the part of defendant to hold to his notice of termination of lease, still claiming his 2% rental on sales of farm equipment, the subject of the present suit. Waiver is largely a question of intent, and from a consideration of the law and the facts, as they appear to the court, there is not sufficient evidence here to hold that defendant waived his intention to terminate the lease. (In re Wil-Lou Cafeterias, Inc., 95 F.(2) 306.)

However, something remains to be said by the court on the subject of forfeiture in this case. The plaintiff has quoted the special statute on the subject of relief from forfeiture (Sec. 17-102, R.C.M. 1947) which provides: "Relief in case of forfeiture. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty."

Defendant replies to this citation by quoting a general statute (Sec. 58-423, R.C.M. 1947) relating

to the extinction of pecuniary obligations, which provides: "Extinction of pecuniary obligations. An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor."

Under the provisions of the special statute quoted the court has authority in a proper case to relieve from forfeiture upon making full compensation. In *U. S. v. Forness*, 37 F. Supp. 337, the court quotes with approval *Davis v. Taylor*, 51 App. D. C. 97, 276 F. 619, 621, which involved a controversy between a landlord and tenant concerning property located in the District of Columbia. The lease provided that if the rent was not paid within ten days of the due date the lease should wholly cease and determine. The [395] tenant had not paid the rent due but had tendered the sum due plus interest since that time. The court said: "Ever since the decision of the Supreme Court of the United States in *Sheets v. Selden*, 7 Wall. 416, 421, 19 L. Ed. 166, it has been the settled law of all federal jurisdictions, except where controlled by statute, that the payment of the rent due, with interest and costs, or the tender of them, before the execution of the judgment for possession, relieves against the forfeiture resulting from the default in the payment of rent. * * * Interpreting the covenant of the lease in question in the light of the law, as we must do, it signifies that since the forfeiture provided for therein has the single purpose of the payment of

the rent the moment the rent, interest and costs are paid or tendered, provided this is done while the tenant is in possession, the forfeiture disappears. The debt having been paid there is no occasion for resorting to the security." In this connection see also *Sheets v. Selden*, 7 Wall. 416, 19 L. Ed. 166; *Prout v. Roby*, 82 U. S. 471, 15 Wall. 471; *In re Gutman*, D. C. 197 F. 472; *Sechrist v. Bryant*, 52 App. D. C. 286, 286 F. 456.

Plaintiff states in its complaint that it is ready, willing and able to make full compensation to defendant if any exists; full compensation here according to precedent would mean principal, interest and costs, which, as the court understands it from the complaint and interpretation thereof in the briefs of counsel for plaintiff, is tendered to defendant in the event of failure to sustain the allegations of the complaint.

On the main proposition in this suit, the demand for a declaratory judgment on the percentage of sales of farm implements and parts, the defendant has won so far as this court is concerned but not in respect to its claim of forfeiture; the only complaint remaining for consideration concerns the tardiness and brevity in accountings and reports.

From the testimony it appears that no audit of actual sales reports was ever refused, nor was access to the books of plaintiff, and that during the first four years of the lease practically the same method of accounting had been pursued by plaintiff without serious complaint by defendant, and plaintiff asserts that any [396] objections made were

considered and complied with to a reasonable extent, and that it is only during the latter years of the lease that demands have been made for a change in accounting and for more information in detail. Plaintiff admits the error made in the fifth year of the lease and explained how it occurred and corrected it; that any other mistakes that might have been made were adjusted long prior to October 3rd, 1949, when defendant gave notice of the termination of the lease.

There appears to be no claim for a percentage rental on wholesale business nor on the transfer of merchandise to other Gamble Stores.

The decision of the court will be in accordance with the views herein expressed. Findings and conclusions may be submitted under the rule. Costs will go to defendant as heretofore indicated. Form of judgment may be submitted. Exceptions allowed counsel.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed February 15, 1951. [397]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came regularly on for trial before the Honorable Charles N. Pray, Judge of the above-entitled Court, sitting without a jury, on

the 27th day of December, 1949, Carter Williams, Esq., and Bjarne Johnson, Esq., appearing as counsel for the plaintiff and H. C. Hall, Esq., and Edw. C. Alexander, Esq., appearing as counsel for the defendant. Both parties having announced themselves ready for trial, evidence both oral and documentary was introduced by plaintiff and defendant and both parties having announced that they rested their respective cases, and both parties having moved for judgment, the case was ordered submitted upon the evidence, the motions for judgment and upon briefs to be prepared and submitted by counsel for the respective parties. The Court, having considered the evidence and briefs of counsel, and being duly advised in the premises, rendered its decision and opinion on the 15th day of February, 1951, reference to which decision and opinion is hereby made as though fully set forth herein.

Now, Therefore, by reason of such decision and opinion, and upon the evidence and the law, the Court makes the following [398]

Findings of Fact

I.

Plaintiff, Gamble-Skogmo, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of Delaware, having its principal office and place of business in Minneapolis, Minnesota. Defendant, McNair Realty Company, is a corporation, organized and existing under and by virtue of the laws of the State of Montana, having

its principal office and place of business at Great Falls, Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

II.

On December 27, 1943, upon a printed lease form provided by the plaintiff and prepared by agents of the plaintiff, the defendant leased to the plaintiff a one-story building and basement situated on the West half of Lot Eight (8) and on Lot Nine (9), Block Three Hundred Sixteen (316), Town or Townsite of Great Falls, Cascade County, Montana, known as 521-523-525 Central Avenue, for the period from March 1, 1944, to and including the last day of February, 1954. A copy of which printed and written lease is attached as Exhibit "A" to plaintiff's Complaint and was introduced in evidence as Plaintiff's Exhibit No. 1. Said lease, among other things, provided as follows:

That the lease was given to plaintiff

"for the purpose of selling merchandise at retail and other business that may be conveniently carried on in connection therewith."

"Time is the essence of this lease and all the provision hereof."

"In consideration of the demise and leasing of the premises aforesaid by said Lessor, the Lessee agrees to pay to the Lessor at such place as shall be designated by the Lessor from time to time in writing or to such other Payee as the Lessor shall designate by written instru-

ment duly acknowledged, as rental for said demised premises during said term a rental at the rate [399] of Fifty-Four Hundred and No/100 Dollars (\$5400.00) per annum payable in equal monthly installments of \$450.00 each in advance on the first day of every month during said term beginning with the first day of March, 1944, plus two per cent (2%) on all net retail sales over Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) per lease year, had and obtained on the above-described premises. No percentage will be paid on wholesale sales to employees or sales or transfers of merchandise to other Gamble Stores.

“Should Lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to the Lessor. Additional rental on the above is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) or on any general wholesale business done as provided for.”

III.

Prior to March 1, 1944, the plaintiff took possession of said leased premises under said lease and at all times since has been occupying said premises for the purpose of selling merchandise and other business that could be conveniently carried on in connection therewith.

IV.

Commencing on or about January 1st, 1947, and continuing to on or about the 23rd day of December, 1949, the plaintiff made net retail sales of farm equipment and other associated items in a total amount of \$258,883.49. With respect to such net retail sales the Court specifically finds that all thereof were "had and obtained" upon the store premises located at 521-523-525 Central Avenue in the City of Great Fall, Montana. Upon this matter the Court finds from the evidence:

That in the operation of its chain of stores the plaintiff sets up various units or departments. From the record herein it appears that there are five of such departments. Apparently some stores have, within their operations, all five departments. Others have one or more. The departments so maintained are as follows:

Unit 1—The department store selling general merchandise;

Unit 2—Food dispensing; [400]

Unit 3—Drug Store;

Unit 4—(Not shown in the record);

Unit 5—Farm implements, parts and repairs.

At the outset the only department placed in operation in Great Falls was Unit 1, the department store. Thereafter Unit 2 was installed and was in operation at the time of trial. Unit 5 was installed on or about January 1st, 1947, and continued in operation until December 23rd, 1949, when it ceased operations.

That an analysis of the methods used in conducting the store operations discloses that the sales made by the Farm Store were as much "had and obtained" upon the premises at 521-523-525 Central Avenue as any other sales made by the store in the usual course of its business operations. Thus it appears that:

(1) There was but one "Gamble Store" operating in Great Falls, and there was but one manager of the entire operations of that store.

(2) This one store was divided into three units or departments, each of which was a part of the "Gamble Store."

(3) The manager of the "Gamble Store" received a commission on all sales made in the three departments of the store.

(4) The business office, and the office of the manager was located in the building at 521-523-525 Central Avenue.

(5) In this business office all of the accounting and bookkeeping for the three departments was handled.

(6) All petty cash used by the farm department in making change was supplied by the business office.

(7) All moneys received through sales made in the farm department were deposited with the business office either immediately or at the close of the day's business.

(8) All sales records whether on credit or for cash were kept in the business office.

(9) All credit sales were approved by the business office. [401]

(10) All contracts for conditional sales were approved by the business office.

(11) There was but one bank account maintained for the entire store operation. All moneys received from sales in all departments went into that bank account. All salaries were paid from that bank account.

(12) All other expenses of operating the farm department were paid out of the business office.

(13) The only telephone available was the telephone in the premises at 521-523-525 Central Avenue. There was no other telephone listed for Gamble's Store.

(14) In all advertising, whether for farm implements or otherwise, the prospective customer was directed to go to the store at 521-523-525 Central Avenue, and the only telephone number given was the telephone at the store on Central Avenue.

(15) The advertisements offered and received in evidence all disclose that farm implements were invariably advertised as being for sale at the Central Avenue Store.

(16) Brochures and other pamphlets advertising farm machinery and implements were kept in the

Central Avenue Store for the benefit of prospective customers.

(17) When, in response to a newspaper advertisement or otherwise, a customer came into the store and evinced an interest in farm implements he was then directed to the store across the alley.

(18) From the advertisements introduced in evidence as exhibits 8 to 15, inclusive, it appears that farm implements were actually displayed and sold in the "down-stairs" store of the premises at 521-523-525 Central Avenue.

(19) Actually a tractor was displayed for sale on the main floor of the Central Avenue premises.

(20) As conclusively appears from the store records introduced in evidenced as exhibits 27 and 28, all sales and expenses of [402] departments 1, 2 and 5 were considered as the sales and expenses of "Gamble's Store"; although for bookkeeping purposes the sales were separated and a bookkeeping charge made against such sales in order "to see if any particular unit is operating at a loss."

(21) There was no complete separation of the farm unit or department from the other store operations. Indeed, the operations were so intermingled as to make it impossible to separate one from the other. Thus, while the premises across the alley were called the "farm store," nevertheless it has at all times been also used as a warehouse for furniture and other items sold directly from the premises on Central Avenue.

V.

The defendant, at all times has claimed that the plaintiff, under the terms of its lease, was required to pay to defendant a 2% additional rental upon all net retail sales made as aforesaid by the farm unit or department of the "Gamble's Store," but the plaintiff has at all times denied such claim, and has at all times refused to account quarterly or otherwise to defendant for any retail sales made, as aforesaid, by said farm unit, and has at all times since January 1st, 1947, refused to pay, quarterly or otherwise, to defendant the 2% additional rental arising out of such retail sales.

VI.

The plaintiff is indebted to the defendant for additional rental arising out of the net retail sales of said farm unit or department as follows:

1. For the quarter ending February
28, 1947\$ 22.34
2. For the quarter ending May 31,
1947\$ 539.13
3. For the quarter ending August 31,
1947\$ 903.75
4. For the quarter ending November
30, 1947\$ 74.72
5. For the quarter ending February
28, 1948\$ 317.46
6. For the quarter ending May 31,
1948\$ 984.76

7. For the quarter ending August 31, 1948	\$1597.24
8. For the quarter ending November 30, 1948	\$ 82.04
9. For the quarter ending February 28, 1949	\$ 27.34
10. For the quarter ending May 31, 1949	\$ 233.33
11. For the quarter ending August 31, 1949	\$ 324.21
12. For the quarter ending November 30, 1949	\$ 68.14
13. For the period November 30, 1949, to December 27, 1949	\$ 3.24

VII.

By reason of the refusal of the plaintiff to account to defendant for such net retail sales of the farm department or to pay to defendant the additional rental due to defendant under the terms of the lease, arising out of such sales, said plaintiff breached the terms and provisions of such lease, and at the time of the filing of plaintiff's Complaint, and at the time of the trial of this action said plaintiff was in default in the payment of rent reserved for more than two consecutive rental periods, and was in default in its covenant and agreement to account to defendant quarterly for the net retail sales of the farm unit or department, and that by reason [404] of such defaults said lease

was on October 3rd, 1949, and has been at all times since, subject to termination by defendant.

VIII.

On October 3rd, 1949, by reason of the defaults of plaintiff, aforesaid, the defendant gave to plaintiff written notice of the termination of the lease, and on October 10th, 1949, defendant demanded of plaintiff a surrender of the leased premises to defendant which demand was refused by plaintiff.

IX.

The defendant has not waived the defaults of the plaintiff, aforesaid, and was on October 3rd, 1949, and at all times thereafter entitled to terminate said lease by reason thereof.

X.

In its Complaint herein the plaintiff alleges that "the plaintiff is ready, willing and able to make full compensation to the defendant" for its default in the payment of rent, if any such default be found by the Court, and, plaintiff through its agent, at the trial of the action, agreed that the plaintiff was "ready, willing and able to make full compensation for that rent with interest, costs and damages" in the event that this Court decided that plaintiff was in default.

XI.

By reason of such offer and agreement, and under the provisions of Section 17-102, Revised Codes of Montana, 1947, the Court finds that plain-

tiff is entitled to be relieved from its defaults, as aforesaid, and from a termination and forfeiture of said lease, provided that plaintiff make full compensation to defendant as alleged and agreed, in the amounts and within the time hereinafter set forth.

XII.

The amount of compensation to be paid by plaintiff to defendant shall be as follows: The sum of \$5,931.18 principal and [405] interest, constituting the rental due defendant as herein set forth with interest thereon at 6% per annum, together with interest on said sum at 6% per annum until paid; the further sum of \$362.25 taxed as costs in this case with interest thereon at 6% per annum until paid. The Court further finds that by reason of the filing of this action and the trial thereof the defendant was required to and did procure the services of attorneys, and is obligated to compensate such attorneys for their services.

Wherefore, by reason of the foregoing Findings of Fact the Court makes the following

Conclusions of Law

I.

The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that the plaintiff, Gamble-Skogmo, Inc., a corporation, is indebted to the defendant in the sum of \$5,177.70 as unpaid rental for the periods set forth in Finding of Fact No. VI, to-

gether with interest upon such unpaid rental at the rate of 6% per annum from the dates upon which such rentals became due, making a total of \$5,931.18.

II.

The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that the plaintiff, Gamble-Skogmo, Inc., a corporation, is in default with respect to the covenants contained in said lease relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff.

III.

The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that said lease is terminated and forfeited and that defendant is entitled to the immediate possession of the premises described in said lease, [406] unless the plaintiff shall pay to defendant within fifteen (15) days after the entry of these Findings and Conclusions and service thereof upon the counsel for plaintiff of the sums set forth in Conclusions Numbered I and IV hereof, in which event the said plaintiff shall be entitled to be relieved of the termination and forfeiture of said lease which has accrued by reason of the defaults set forth herein.

IV.

That the defendant, McNair Realty Company, a corporation, is entitled to recover from plaintiff

its costs and disbursements herein incurred in the sum of \$362.25, with interest thereon at the rate of 6% per annum from February 15th, 1951.

V.

Judgment shall not be entered herein until after the expiration of fifteen (15) days from the entry of these Findings and Conclusions, during which period plaintiff may, if it so elects, make the payments to defendant required under these Findings and Conclusions, and the Court hereby retains jurisdiction of the cause for the purpose of entering a proper judgment upon the expiration of such period.

VI.

The Court further retains jurisdiction to consider the question whether after judgment in this cause shall have become final, the defendant is entitled to recover from plaintiff the reasonable fees of defendant's attorneys which defendant has become obligated to pay by reason of this action. Such matter shall be determined by the Court after petition for the allowance of such attorneys' fees filed and served by defendant, and hearing thereon by the Court.

Dated this 24th day of February, 1951.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed February 24, 1951. [407]

In the District Court of the United States for the
District of Montana, Great Falls Division

Civil No. 1195

GAMBLE-SKOGMO, INC., a Corporation,

Plaintiff,

vs.

McNAIR REALTY COMPANY, a Corporation,

Defendant.

JUDGMENT

The Court having heretofore and on the 24th day of February, 1951, duly made, filed and entered its Findings of Fact and Conclusions of Law in the above cause, reference to which is hereby made, and it now appearing to the Court that the plaintiff above named has tendered to the defendant the sum of \$6,305.20 as required by said Findings and Conclusions as compensation to defendant, other than by way of attorneys' fees,

Now, Therefore, It Is Hereby Decreed, Adjudged and Declared:

1. The plaintiff was, at the time of the filing of its Complaint herein, in default with respect to the covenants contained in the lease between plaintiff and defendant relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail

sales made by plaintiff for the period January 1st, 1947, to August 31st, 1949, and as of December 23rd, 1949, was indebted to defendant for unpaid rental in the sum of \$5,177.70.

2. By reason of such defaults the defendant was entitled, [408] under the terms of the lease, to declare the lease terminated on October 3rd, 1949, and was entitled to the possession of the leased premises on October 10th, 1949.

3. That by the tender on March 6th, 1951, of the sum of \$6,305.20, representing unpaid rental plus interest and the costs of this suit, with interest on all of said sums from February 24th, 1951, to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease; provided, however, that this Court reserves and retains jurisdiction of said cause for the purpose of determining and adjudging, after petition filed and hearing thereon, whether defendant is entitled to recover from plaintiff, in addition to the sums above set forth, the reasonable fees which defendant has become obligated to pay its attorneys by reason of the filing and prosecution of this action.

4. That defendant have and recover of and from

plaintiff defendant's costs herein incurred amounting to and taxed at the sum of \$362.25.

Dated this 14th day of March, 1951.

CHARLES N. PRAY,

Judge.

[Endorsed]: Filed and entered March 14, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that McNair Realty Company, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that portion of the final judgment entered in this action on the 15th day of March, 1951, to wit: that portion of said judgment that Orders, Adjudges and Decrees,

“3. That by the tender on March 6th, 1951, of the sum of \$6,305.20, representing unpaid rental plus interest and the costs of this suit, with interest on all of said sums from February 24th, 1951, to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the afore-said defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease.”

Dated this 23rd day of March, 1951.

H. C. HALL,

EDW. C. ALEXANDER,

HOWARD C. BURTON,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed April 2, 1951. [410]

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Know All Men by These Presents:

That we, McNair Realty Company, a corporation, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Gamble-Skogmo, Inc., a corporation, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Gamble-Skogmo, Inc., a corporation, its attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our Seals and dated this 23rd day of March, 1951.

Whereas, lately at a session of the District Court of the United States for the State of Montana in a suit pending in said Court designated as Civil No. 1195, between Gamble-Skogmo, Inc., a corporation, plaintiff and McNair Realty Company, a

corporation, defendant, judgment was duly made, given and entered, and the said McNair Realty Company, a corporation, having filed with the said District Court a notice of appeal as provided by the Rules [412] of Civil Procedure.

Now, the condition of the above obligation is such, that if the said McNair Realty Company, a corporation, shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, or if the appeal is dismissed on the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; otherwise to remain in full force and effect.

[Seal] McNAIR REALTY COMPANY,
A Corporation,

By /s/ C. S. McNAIR,
President.

[Seal] UNITED STATES FIDELITY
AND GUARANTY
COMPANY,

By /s/ JOHN W. JACOBUS,
Attorney in Fact.

Countersigned:

 B. P. McNAIR CO.,
By /s/ FLORENCE L. KALIA,
Montana Licensed Agent.

[Endorsed]: Filed April 2, 1951. [413]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

Notice is hereby given that Gamble-Skogmo, Inc., a corporation, hereby cross-appeals to the Circuit Court of Appeals for the Ninth Circuit from that portion of the final judgment entered in this action on the 14th day of March, 1951, to wit:

That portion of said judgment which Orders, Adjudges and Decrees:

“1. The plaintiff was, at the time of the filing of its complaint herein, in default with respect to the covenants contained in the lease between plaintiff and defendant relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff for the period January 1st, 1947, to August 31st, 1949, and as of December 23rd, 1949, was indebted to defendant for unpaid rental in the sum of \$5,177.70.”

“2. By reason of such defaults the defendant was entitled under the terms of the lease, to declare the lease terminated on October 3rd, 1949, and was entitled to the possession of the leased premises on October 10, 1949.”

“4. That defendant have and recover of and from plaintiff defendant's costs herein incurred amounting to and taxed at the sum of \$362.25.”

Dated this 13th day of April, 1951.

I. W. CHURCH,

G. G. HARRIS,

BJARNE JOHNSON,

CARTER WILLIAMS,

Attorneys for Plaintiff and
Cross-Appellant.

[Endorsed]: Filed April 13, 1951. [422]

[Title of District Court and Cause.]

UNDERTAKING ON CROSS-APPEAL

Know All Men by These Presents:

That we, Gamble-Skogmo, Inc., a corporation, as Principal, and American Casualty Company of Reading, Pennsylvania, as surety, are held and singly bound unto McNair Realty Company, a corporation, in the full and just sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to the said McNair Realty Company, a corporation, its attorneys, successors or assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents;

Sealed with our seals and dated this 13th day of April, 1951.

Whereas, lately at a session of the District Court

of the United States for the State of Montana in a suit pending in said Court designated as Civil No. 1195 between Gamble-Skogmo, Inc., a corporation, Plaintiff, and McNair Realty Company, a corporation, Defendant, judgment was duly made, given and entered and the said Gamble-Skogmo, Inc., a [424] corporation, having filed with the said District Court a notice of Cross-Appeal as provided by the rules of civil procedure,

Now, Therefore, the condition of the above obligation is such that if the said Gamble-Skogmo, Inc., a corporation, shall prosecute its said Cross-Appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, or if the Cross-Appeal is dismissed on the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

GAMBLE-SKOGMO, INC.,
A Corporation.

By CARTER WILLIAMS,
Attorney for Plaintiff.

[Corporate Seal]

AMERICAN CASUALTY
COMPANY OF READING,
PENNSYLVANIA.

By J. W. SOGARD,
Attorney in Fact.

[Endorsed]: Filed April 13, 1951. [425]

[Title of District Court and Cause.]

TENDER OF PAYMENT

To: McNair Realty Company and H. C. Hall and
Edw. C. Alexander, its attorneys:

Pursuant to and in conformity with the Findings of Fact and Conclusions of Law heretofore filed in the above-entitled matter, we hand you herewith the sum of Five Thousand Nine Hundred Thirty-one and 18/100 (\$5,931.18) Dollars representing compensation to be paid by Plaintiff to Defendant; the sum of Three Hundred Sixty-two and 25/100 (\$362.25) Dollars representing costs and the further sum of Eleven and 77/100 (\$11.77) Dollars which we calculate to be the interest due in this matter from date of entry of Findings of Fact and Conclusions of Law up to the present date.

Dated the 6th day of March, 1951.

CHURCH, HARRIS,
JOHNSON & WILLIAMS,

By BJARNE JOHNSON,
Attorneys for Plaintiff
Gamble-Skogmo, Inc.

Proper tender of the sum of \$6305.20 is hereby acknowledged and such tender is hereby refused.

HALL, ALEXANDER &
BURTON,
By H. C. HALL,
Attorneys for Defendant.

[Endorsed]: Filed March 6, 1951. [426]

[Title of District Court and Cause.]

DESIGNATION OF POINTS TO BE RELIED
UPON BY APPELLANT

Whereas, McNair Realty Company, a corporation, has perfected an appeal to the United States Court of Appeals for the Ninth Circuit from a portion of a judgment and decree made and entered in the above cause on the 15th day of March, 1951, and has served its designation of the portions of the record in said District Court to be transmitted to said Court of Appeals.

Now, Therefore, said appellant now designates the following points upon which it intends to rely upon said appeal:

1. The judgment and decree of the District Court is erroneous in so far as it adjudges that by the tender of the sum of \$6305.20 with interest to the defendant the plaintiff is entitled to be and is relieved from the termination and forfeiture of the lease between plaintiff and defendant dated December 27th, 1943, and is entitled to remain in possession of the leased premises.

2. The District Court failed to give effect to the following provision of the lease between plaintiff and defendant:

“16. If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein [419] contained to be kept by the Lessee, it shall be

lawful for the Lessor at the Lessor's election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants."

3. The District Court failed to give effect to the following provision of the lease between plaintiff and defendant:

"Time is the essence of this lease and all the provisions hereof."

4. The District Court having expressly adjudged that "the plaintiff was, at the time of filing its complaint herein, in default with respect to the covenants contained in the lease between plaintiff and defendant relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff for the period January 1, 1947, to August 31, 1949," erred in adjudging that plaintiff was entitled to be relieved from a termination of the lease under the provisions of Section 17-102, Revised Codes of Montana, 1947.

5. The District Court having expressly adjudged

that "by reason of such defaults the defendant was entitled, under the term of the lease, to declare the lease terminated on October 3, 1949, and was entitled to the possession of the leased premises on October 10, 1949," erred in adjudging that plaintiff was entitled to be relieved from such termination under the provisions of Section 17-102, Revised Codes of Montana, 1947.

6. The refusal of the plaintiff to make a quarterly accounting to defendant of all net retail sales was intentional and wilful.

7. The refusal of the plaintiff to pay a percentage upon net retail sales made by its farm unit or department was intentional and [420] wilful.

8. Under the evidence the District Court was without jurisdiction to relieve the plaintiff from a termination of the lease according to its express provisions.

Dated this 4th day of April, 1951.

McNAIR REALTY COMPANY,
a Corporation,

By H. C. HALL,

EDW. C. ALEXANDER,
Its Attorneys.

Service admitted.

[Endorsed]: Filed April 4, 1951. [421]

[Title of District Court and Cause.]

DESIGNATION OF POINTS TO BE RELIED
UPON BY APPELLEE AND APPELLANT
ON CROSS-APPEAL

Whereas, Gamble-Skogmo, Inc., a corporation, has perfected a cross-appeal to the United States Court of Appeals for the Ninth Circuit from a portion of a judgment and decree made and entered in the above-cause on the 14th day of March, 1951, and has served its designation of the portions of the record in said District Court to be transmitted to said Court of Appeals.

Now, Therefore, the said appellant on cross-appeal now designates the following points upon which it intends to rely upon said cross-appeal.

1. The judgment and decree of the District Court is erroneous insofar as it adjudges that at the time of the filing of its complaint the plaintiff was in default with respect to the covenants contained in the lease of December 27, 1943, relating to the payment of rental and to the quarterly accounting required to be made by the plaintiff to the defendant covering net retail sales made by plaintiff for the period January 1, 1947, to [432] August 31, 1949.

2. The judgment and decree of the District Court is erroneous insofar as it adjudges that as of September 23, 1949, the plaintiff was indebted to the defendant for unpaid rental in the sum of \$5,177.70 in that of December 23, 1949, the plaintiff

did not owe the defendant anything for unpaid rental.

3. The sales of farm machinery and equipment were had and obtained on two other premises other than the demised premises and were not "had and obtained" on the demised premises.

4. By their acts and correspondence, both the plaintiff and the defendant placed a practical construction upon the lease of December 27, 1943, to the effect that sales of farm machinery and equipment were not included within the provisions of the lease of December 27, 1943.

5. The plaintiff was not in default of any of the terms of the lease of December 27, 1943, on the date of October 3, 1949, nor at the time of the filing of the plaintiff's complaint.

6. The judgment and decree of the District Court is erroneous insofar as it adjudges that by reason of certain defaults the defendant was entitled under the terms of the lease to declare the lease terminated on October 3, 1949, and that the defendant was entitled to the possession of the leased premises on October 10, 1949.

7. If the plaintiff is in default under the terms of lease of December 27, 1943, the plaintiff is entitled to relief from forfeiture and termination of that lease, not only by the tender made on March 6, 1951, but also by the tender made during the negotiations from October 24th to October 28th, inclusive, in 1949, the tender made in the plaintiff's

complaint, and the tender made by the plaintiff's representative during the course of [433] the trial.

8. If the final decision of this case is to the effect that the plaintiff is in default under any of the terms of the lease of December 27, 1943, the plaintiff once again hereby offers to make full compensation to the defendant for any such default or defaults and hereby offers to pay to the defendant the full amount of the principal, interest and costs, and to do all else that law and equity requires to prevent a forfeiture and termination of the lease.

9. In addition to the provisions of Section 17-102, Revised Codes of Montana, 1947, plaintiff is also entitled to be relieved from forfeiture in the event of default because the strict enforcement of the forfeiture or termination clause would be unjust, oppressive, and contrary to the general principles of equity.

10. The opinion and order of the District Court is erroneous insofar as it excluded from the case any evidence of a tender of full compensation made by the plaintiff to the defendant during the period of time from October 24th to October 28th, inclusive, 1949.

11. The District Court erred in retaining jurisdiction for the purpose of determining whether or not the plaintiff was obligated to pay to the defendant a sum for defendant's reasonable attorneys' fees in that the defendant is not entitled to recover for its attorneys' fees in this action.

12. The judgment and decree of the District Court is erroneous insofar it adjudges that the defendant have and recover from the plaintiff the defendant's costs which were taxed at the amount of \$362.25. [434]

13. The defendant waived its rights, if it ever had any, to demand a quarterly accounting on a net retail sales of farm machinery and equipment and to claim a 2% rental on said sales.

14. The defendant waived its rights, if it ever had any, to enforce the forfeiture or termination of the lease of December 27, 1943.

Dated this 17th day of April, 1951.

I. W. CHURCH,

G. G. HARRIS,

BJARNE JOHNSON,

CARTER WILLIAMS,

Attorneys for Gamble-Skogmo, Inc., a Corporation.

Service admitted.

[Endorsed]: Filed April 17, 1951. [435]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Be it Remembered, That the above-entitled cause came on regularly for hearing in the District Court of the United States, in and for the District of Montana, Great Falls Division, in the Federal Building at Great Falls, Montana, on December 27th, 28th and 29th, 1949, before the Honorable Charles N. Pray, Judge Presiding, without a jury.

Whereupon, the following proceedings were had and done, to wit:

* * *

Mr. Williams: Plaintiff Gamble-Skogmo, Inc., is ready, your Honor.

Mr. Hall: The defendant is ready, your [27*] Honor.

* * *

DALE COCKAYNE

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Williams:

Q. What is your name?

A. Dale Cockayne.

Q. Where do you reside, Mr. Cockayne?

A. 117 - 28th Street South.

Q. In Great Falls, Montana?

A. Great Falls, yes. [28]

(Testimony of Dale Cockayne.)

Q. What is your present occupation?

A. Manager of the local Gamble Store.

Q. Is that a store operated by Gamble-Skogmo, Inc., the plaintiff in this action? A. Yes, sir.

Q. How long have you been manager of the Gambles' Store?

A. Here in Great Falls since September of 1947.

Q. What was your occupation prior to that?

A. Store opening work.

Q. And what does that consist of?

A. Opening new accommodation stores as we term them, any new department stores.

Q. For whom did you do that work?

A. For Gamble-Skogmo.

Q. Out of what office did you work?

A. Out of the Minneapolis office.

Q. Have you ever managed any other stores?

A. Yes, sir, I managed the store at Wishaskie, Wisconsin, and also the store at Seldon, Iowa.

Q. Have you ever been an assistant manager in a store?

A. Yes, sir, Sioux Falls, South Dakota.

Q. How long have you been employed by the plaintiff?

A. Ten years on April 18th of 1950.

Q. How many of those years did you work out of the headquarters offices in Minneapolis?

A. Two years. [29]

Q. Does the plaintiff Gamble-Skogmo own other stores? A. Yes, sir.

Q. Do they operate other stores?

(Testimony of Dale Cockayne.)

A. Yes, they do, Gamble Stores, West Coast Supply Stores, and McLeod Stores in Canada.

Q. Approximately how many years has the plaintiff Gamble-Skogmo, Inc., been in the merchandising business? A. Twenty-five years.

Q. Now, in the operations in Great Falls which you are in charge of does the plaintiff own any real property? A. No, sir, we don't.

Q. How did you carry on your operations in Great Falls in respect to property?

A. By leasing the same.

Q. What properties do you lease?

A. The department store from McNair Realty Company.

Q. Is that the premises known as 521, 523 and 525 Central Avenue? A. Yes, sir, it is.

Q. You refer to that as a department store, do you? A. Yes, sir.

Q. Is that the property involved in the present lawsuit? A. Yes, sir, it is.

Q. Is there a written lease on that property?

A. Yes, sir, there is.

Q. With whom is it entered into? [30]

A. With the McNair Realty Company.

Q. Is that the lease involved in this lawsuit?

A. Yes, sir, it is.

Mr. Williams: If the Court please, that lease is set forth at length in the complaint as Exhibit A, and it is admitted by the defendant that was the lease entered into and that it is true and correct. I doubt if we have to introduce in evidence the original of that lease; however, it occurs to me that

(Testimony of Dale Cockayne.)

the Court may wish to have that introduced in evidence since the original lease was made on a regular lease form made by Gamble-Skogmo, Inc.

The Court: There is no difference as to the contents, is there, of the copy attached to the complaint and the original lease?

Mr. Williams: There is no difference in the contents but part of the original lease has had things typed in the blank spaces and additional rental provisions.

The Court: What have you to say about that, Mr. Hall? Have you agreed that the copy attached to the complaint is sufficient, is the exact lease and contains the exact terms of the original lease?

Mr. Hall: I don't think there is any question about that, your Honor, but I think it would be helpful in showing that this is a Gamble-Skogmo form partially printed with blank spaces filled in by typing and shows approval by [31] some officer.

The Court: I suppose there are duplicate originals of that lease?

Mr. Hall: That is right.

The Court: That is how you know the copy is correct?

Mr. Hall: Yes, your Honor.

The Court: As far as the contents are concerned.

Mr. Hall: Yes, your Honor.

The Court: Well, you might introduce that original lease so that would show exactly how the form is prepared and what insertions were made and what it pertains to.

(Testimony of Dale Cockayne.)

Mr. Williams: I have in my hand a document marked Plaintiff's Exhibit 1, which purports to be the original or one of the originals of the lease entered into on the 27th day of December, 1943, between McNair Realty Company and Gamble-Skogmo, Inc. Will you stipulate that that is an original of the lease in question?

Mr. Hall: We have no objection, your Honor.

The Court: Very well, it may be introduced in evidence, if you offer it.

(Whereupon, said Plaintiff's Exhibit No. 1, offered and received in evidence, is in words and figures as follows, to wit:)

[Exhibit No. 1 is identical with Exhibit A to the Complaint, supra, pages 9 to 24 inclusive.] [32]

* * *

Q. (By Mr. Williams): In addition to the written lease on the department store at 521, 523, 525 Central Avenue does the plaintiff lease other property in Great Falls, Montana?

A. Yes, we lease two other properties in Great Falls, one from the McNair Realty Company and one from the Roy Anderson Company.

Q. What is the other property you lease from the McNair Realty Company?

A. A warehouse and a lot behind our department store and the property—— [33]

* * *

(Testimony of Dale Cockayne.)

Q. You do, however, know that you lease other property [34] from McNairs on First Avenue North, is that correct? A. Yes, sir.

Q. What is the situation as to the other property you lease in Great Falls, Montana?

A. We do lease some other property from the Roy Anderson Company at Ninth Avenue and 23rd Street, North.

Q. Do you pay rent for that property?

A. Yes, sir, \$180.00 a month.

Q. What rent do you pay for the property leased from the McNair Realty Company?

A. \$90.00 a month.

Q. Has the rent always been \$90.00 a month on that particular piece of property?

A. No, when we first rented from them it was \$60.00; it was raised to \$90.00 about a year ago.

Q. What is the situation of the Gamble Stores here in Great Falls as to their division into units, are they divided into units?

A. Yes, sir, they are. Unit 1 is known as the department store; unit 2 is food dispensing; and unit 5 is farm store.

Q. Where is unit 2 located? Where is the department store located?

A. 521, 523, 525 Central.

Q. What is sold in that store? [35]

A. Merchandise that would commonly be sold in a department store, such as clothing, hardware, furniture, and clothing of all types.

Q. What is your unit 2?

(Testimony of Dale Cockayne.)

A. It is food department or luncheonette.

Q. Where is that located?

A. That is located in the right-hand corner of the department store in the back of the building.

Q. What is your unit 5?

A. Unit 5 is farm implements and parts for those farm implements.

Q. What do you mean when you say farm implements?

A. Items manufactured by the Cockshutt Manufacturing Company, such as combines, seeders, mowing machines, rakes and all types and kinds of farm implements.

Q. Where is the farm store located?

A. In the back of the department store in the building rented from the McNair Realty Company.

Q. Now you say in the back of the department store; do you mean on the same premises as the department store?

A. No, of the building that would probably be 520 First Avenue North.

Q. Do you have any of your farm equipment or parts on the premises leased under this written lease which is Exhibit 1?

A. No, sir, we do not. [36]

Q. Have you ever, during the period you were manager, had any of the farm implements or parts either stored or displayed in the department store?

A. No, sir, we haven't. The implements, of course, it would be impossible to get them in the

(Testimony of Dale Cockayne.)

store, and the parts are housed across at 520 First Avenue North property.

Q. I understand that you stated that you were working for the plaintiff in 1943; is that correct?

A. Yes, sir, I was.

Q. Were you working for the plaintiff in December of 1943? A. Yes, sir.

Q. Where were you working at that time?

A. Sioux Falls, South Dakota.

Q. Were you acquainted with the general Gamble organization at that time? A. Yes, sir.

Q. Was the plaintiff involved in the sale of farm implements in December, 1943? A. No, sir.

Q. Was it involved in the sale of farm implements anywhere in the United States in December, 1943? A. Not to my knowledge.

Q. Would you have known if it were?

A. Yes, sir.

Q. I take it from that, then it was not involved in the sale of farm implements in Great Falls in December, 1943; is that correct?

A. That is correct, sir.

Q. I understand that your farm implements are classified [37] as unit 5; was there a unit 5 at any time during 1943 in the Gambles organization?

A. No, sir, there was not.

Q. When did the plaintiff first go into the farm machinery merchandising?

A. 1945 some time.

Q. How many sales units were there in Great

(Testimony of Dale Cockayne.)

Falls when the Gamble Store first opened here in March of 1944? A. Just one.

Q. When was unit 2 added?

A. In November of 1946.

Q. When was the farm store added?

A. January of 1947.

Q. I understand that you didn't come until September, 1947, to the Gamble Store in Great Falls, is that right? A. Yes, sir, it is right.

Q. Then how do you know that the unit farm store was started prior to the time you arrived?

A. Because of the monthly statements. In other words, January was the first month that there was a statement for it of 1947, and one of the purposes in having these various units is to know exactly what the profit or loss is on them, and in January, 1947, is when the first unit 5 statement appears.

Q. Are these statements made here in the local Gamble Store?

A. No, sir, they are not. They are made from the sales [38] figures and expenses we send in from the store here.

Q. Are they made in the regular course of business of Gamble-Skogmo, Inc.?

A. Yes, sir. The sales figures and expenses are sent from here to Denver and there the monthly statements are prepared.

Q. Is it a requirement of the company that these figures be prepared? A. Yes, sir.

Q. When Gamble-Skogmo, Inc., first started to

(Testimony of Dale Cockayne.)

sell farm implements in Great Falls, early in 1947, what premises were used for these sales?

A. From land that was rented from International Harvester Company, and also the lot that is rented from the McNair Company on First Avenue North.

Q. Is that disclosed by your records?

A. Yes.

Q. Since you have been manager where have the farm implements and parts been stored or displayed?

A. In the building rented from the McNair Company on First Avenue North, and from the building rented from the Roy Anderson Company on 23rd and 9th Avenue North.

Q. Is the plaintiff still in the business of selling farm implements and parts in Great Falls, Montana?

A. No, sir, we are not.

Q. When did you cease the operation of your farm store?

A. About thirty days ago. [39]

Q. What was the reason that you stopped operating a farm store?

A. We were unable to get the proper type of buildings, etc., and with the present lease difficulties that we are having it would make it prohibitive to operate it.

Q. Do you understand that McNair Realty Company, the defendant here, is claiming a 2% rental under the lease agreement which is introduced in evidence as Plaintiff's Exhibit 1?

A. Yes, sir.

(Testimony of Dale Cockayne.)

Q. Now, will you tell the court, the normal manner in which farm sales were conducted during the time that you were the manager here?

A. Well, the number one thing there, of course, before anybody buys an implement or any item of a large dollar volume he is naturally interested in seeing that item. In many cases he is also interested in seeing the item work. So in order to tell the court what took place it would almost be necessary to use the two examples, one on where the item was delivered to the customer's place of business, ranch or farm, whatever you want to term it, and there the item is put to use and if it proves to his satisfaction, the sale was completed. The other one would be for a smaller item such as a mowing machine, rakes, items of that nature are not always demonstrated before they are sold. In that case, the man would be taken up to the Roy Anderson lot, or to the McNair lot on First Avenue North, [40] depending on where the item was located, and there shown the item and, of course, told of the merits that it has and the sale completed. In the case of parts he would go to the building on First Avenue North and there secure the parts. Is that complete enough?

Q. Has it ever been possible for a prospective purchaser to examine any of the merchandise sold by your farm store on the department store premises at 521, 523 and 525 Central Avenue?

A. No, it hasn't. It would, of course, be impossible to get those items inside the store; not impos-

(Testimony of Dale Cockayne.)

sible but improbable. You could get them in if you tore them all down and set them back up again.

Q. How far is the Anderson warehouse that you have talked about, at which the farm implements are, how far is that from the department store? A. Approximately two miles.

Q. Who is in charge of your office, in charge of your farm store? A. Alvin Hunt.

Q. From what office did he operate?

A. From the building on First Avenue North.

Q. Did he have occasion to do any book work in connection with the farm sales?

A. Oh, yes, we kept perpetual inventories on all the farm parts and made weekly reports on the amount of implements [41] sold.

Q. Where did Hunt do his book work?

A. In the building on First Avenue North.

Q. The building on First Avenue North, is that covered by the written lease which is introduced in evidence as Plaintiff's Exhibit 1?

A. No, sir, it isn't.

Q. Was there anybody working in the farm store besides Al Hunt?

A. During the seasons, yes.

Q. How many men or how many employees?

A. Well, it would vary. We have had salesmen out on the road calling on farmers, and also had men up at the Roy Anderson lot assembling the machinery when it comes in. You understand it is all knocked down so it can be loaded on freight cars, and there was men up there setting that up,

(Testimony of Dale Cockayne.)

and men on the road calling on customers, and men in the building on First Avenue North selling parts.

Q. Were all of these men working directly under Al Hunt? A. Yes, sir, they were.

Q. Did any of these men use the department store as a base of operation?

A. No, sir, they did not.

Q. Who had the responsibility for the purchase of stock in the farm store?

A. Al Hunt, under my supervision.

Q. Who had the power to hire and fire employees at the farm store? A. Al Hunt. [42]

Q. Who had the direct supervision of these men who were assembling the parts and selling the parts and selling the implements? A. Al Hunt.

Q. Did you have supervision of Mr. Hunt?

A. Yes, sir.

Q. Did he have any other supervision?

A. Yes, we have specialists in the field such as implement supervisors, men who travel with only that one job; also parts supervisors, also our own district manager, Mr. McNat, from Billings, and Mr. Fikkan, from Denver.

Q. All these people shared with you supervision of the farm store?

A. Yes, sir, that is correct.

Q. Now in a normal cash sale where would the money exchange hands when the property sold, was sold by the farm store?

A. Well, let's take two items, and first take a combine, which in all cases, I believe, or most cases

(Testimony of Dale Cockayne.)

were up at the Anderson property. That, of course, would be a cash sale, with the exception of one of the 35 or 36 were all sold for cash. In most cases the man would issue you a check and you would give him a receipt.

Q. When you say the man would issue "you," whom do you mean?

A. The salesman, Al Hunt or whoever the salesman happened to be that was up there. That money would then, of course, come down to the business office on the balcony in the store. On the other hand, if it were a parts sale due to the fact [43] they were so numerous in season we kept change in the McNair building on First Avenue North and periodically during the day that would come up to the business office in the department store.

Q. After the money exchanged hands when was the merchandise delivered?

A. Well whenever the customer wanted it just as soon as after he had purchased it; in most cases the minute they buy it they want it fifteen minutes later so it wasn't much longer than that.

Q. Where was the property located?

A. To the customer's place of business.

Q. Did any of these accounts or deliveries go through the department store at 521 Central Avenue?

A. Not that I know of, Carter.

* * *

Q. Mr. Cockayne, in a normal cash sale of a

(Testimony of Dale Cockayne.)

farm implement or part from the time the purchaser is first contacted [44] until the cash exchanges hands what part of the transaction takes place on the premises known as 521, 523, 525 Central Avenue?

A. None of that part of the transaction would take place in the department store.

Q. After the sale has been completed what happens?

A. Well, assuming that it was a small part—nothing. By that I mean the man is given a sales slip and goes on his way.

Q. You stated that after the sale the man is given a sales slip, by that you mean the purchaser is given a sales slip? A. Yes, sir.

Q. Who makes out that sales slip?

A. Whoever the salesman was that sold it to him.

Q. Is that made on the department store premises?

A. No, sir, it is not. Assuming now that it was a large implement; that check in all probabilities would be brought immediately to the department store.

Q. The check would be? A. Right.

Q. Let's go back. The sales slip is made out and delivered to the purchaser; what happens to the sales slip then?

A. Well, it is put on a spindle, and when the money is turned in to——

Q. Where is the spindle? [45]

A. In the building on First Avenue North.

(Testimony of Dale Cockayne.)

Q. And then what happens?

A. And then when it is turned in to the book-keeping department it is rung up in the register in the business office in the department store.

Q. Are the sales slips and the money accompanying them turned over to the business office daily?

A. Yes, sir, they are.

Q. What records are kept in the building on First Avenue North after the sale is completed?

A. All the records are kept there with the exception of the cash, or the dollars and cents. In other words, there is a perpetual inventory kept there as to what we have in stock. There is a record kept there as to what we have sold and who it has been sold to. That is, implements. We don't keep parts sales that way but we do keep implement sales that way.

Q. Are all of these records kept in the building on First Avenue North?

A. Yes, sir.

Q. Are there duplications in the department store building?

A. No, sir, there isn't.

Q. After the sales slip and money is delivered to the accounting office what happens to it?

A. It is handled in the usual channel. In other words, it is rung up in the cash register and merely becomes a bookkeeping procedure from then [46] on out.

Q. Does the farm store pay any part of the bookkeeping expenses?

A. It pays its rightful share, yes.

Q. Now up until now, Mr. Cockayne, we have

(Testimony of Dale Cockayne.)

been discussing these cash sales; what is the situation on contract sales and the normal procedure in in a contract sale of a farm implement?

A. Well, up until 1949, we didn't have a single time payment sale on farm implements due to the fact, of course, that they were so critical and people were so anxious to get them and money was plentiful and etc., they were all cash sales. This year in order to sell some of those large ticket items it was necessary to sell them on time payment. Most of those sales it was necessary also to demonstrate that particular item; for instance, if it were a combine, that combine would be taken to the man's place of business and there would be demonstrated, and he would tell us he wanted it on time payment. We would make out the form.

Q. Who would make out the form?

A. The salesman, whoever was calling on him.

Q. Where did he make the form?

A. At the man's place of business.

Q. And what would happen to this—is this form a conditional sales contract?

A. Yes, sir, it it. On the top part of it, it requires [47] the items and at the bottom part, the information regarding customer's credit.

Q. What happened to this contract after it was written up?

A. It would be taken to our credit office on the balcony.

Q. Did the prospective purchaser receive a copy of that contract at that time?

(Testimony of Dale Cockayne.)

A. After it was approved or disapproved, whichever the case might have been.

Q. Very well, then you state it was taken to the credit office? A. That is right.

Q. Where is that located?

A. That is on the baycony of the department store. Now, in one or two occasions, the customer has been brought into the department store and there his application taken for credit.

Q. And in the event the man's credit is found unsatisfactory is there a sale made?

A. No, sir, there isn't.

Q. In the event the prospective purchaser's credit is satisfactory, what happens?

A. He makes his down payment and the merchandise is delivered to him and a copy of the contract is also delivered to him, or in the case where the item has been demonstrated at his place naturally there is no delivery problem, so a [48] copy of the contract is sent to him or taken out to him. because at that time the machine would need further adjustment.

Q. What percentage of your farm sales have been contract sales? A. 2.21.

Q. 2.21 per cent? A. Yes, sir.

Q. How many contract sales have you had altogether in the farm store? A. Nine [49]

* * *

Q. (By Mr. Williams): Mr. Cockayne, you have now in your possession, have you not, the two volumes which purport to be the sales records of

(Testimony of Dale Cockayne.)

Gamble-Skogmo, Inc., store here in Great Falls, Montana?

A. Yes, sir, up to and including September 30th, I believe. Yes.

Q. What is the beginning date of these records?

A. March of 1946. It is in 1943, but the top of it is torn off, Carter, I can't answer that.

Q. At any rate the records go back to sometime in 1943?

A. Yes, sir.

Q. Do those records show your gross sales for the Gamble-Skogmo store here in Great Falls?

A. Yes, sir, they do.

Q. Do they show all wholesale sales during that period of time? [50]

A. They show every sale that has been made and every expense that has been made from the inception sometime in 1943 up until and including September of this year.

Q. Were these records prepared in the normal course of business of Gamble-Skogmo, Inc.?

A. Yes, sir, they were.

Q. Prior to the time that they were subpoenaed in the District Court of Montana, in Great Falls, were they in your possession?

A. Yes, sir, they were.

Q. And since you have been manager of the Gamble store here in Great Falls, Montana, were those records prepared under your supervision?

A. Yes, sir, they were.

Q. To the best of your knowledge were those records true and correct?

(Testimony of Dale Cockayne.)

A. Yes, sir, they were.

Q. From those records will you tell the court what the total net retail sales of farm implements and parts were from the time the farm store was first started in Great Falls, Montana, to October 19th, 1949.

A. \$259,320.40. Now, incidentally, that figure is right up to December 23rd.

Q. The figure which you have just given me then is from the time that farm sales were first started at Great Falls, Montana, until December 23rd, 1949?

A. Until it was closed out, yes, sir.

Q. And does that include all farm sales?

A. Yes, sir. [51]

Q. Then I am to understand from you that the total amount of farm sales is the figure of \$259,320.40?

A. Yes, sir, that is correct to the best of my knowledge.

Q. I believe you testified that Gamble-Skogmo, Inc., is no longer in the farm store business in Great Falls, Montana?

A. Yes, sir, that is correct.

Q. Then if the defendant McNair Realty Company is entitled to 2% on farm sales, it would be entitled to 2% on the figure of \$259,320.40, is that correct?

A. Yes, sir, that is correct.

Q. What is 2% of that figure?

A. I don't have it here.

Q. Do you have it elsewhere that you have figured it up?

A. No. \$5,186.40 and 80 mills.

(Testimony of Dale Cockayne.)

Q. What figure do you have?

A. \$5,186.40

Q. Do the records which you have in front of you show the total amount of rent which has been paid by the farm store apart from any rent claimed by McNair Realty Company by virtue of the written lease dated December 27th, 1943?

A. Yes, sir, they do. That amount is \$6,973.26, which gave us a rental percentage of 2.68.

Q. When you say that gives you a rental percentage of 2.68, what do you mean?

A. The percentage of rent paid on the total sales we have had since the inception of the farm unit up until the [52] time it was closed out.

Q. Does that account for any rent claimed by McNair Realty Company by virtue of their lease dated December 27, 1943? A. No, it does not.

Q. If Gamble-Skogmo, Inc., had paid 2% as claimed under that lease, what would your total rental percentage be? A. 4.68. [53]

* * *

Mr. Williams: Read the question.

(Question read.)

Q. Does the plaintiff Gamble-Skogmo, Inc., have a company policy on the bookkeeping setup and the payment of expenses of the individual units?

A. Yes, sir, they do. The purpose of keeping the various units separate is to decide whether or not it is or is not profitable, so for that reason it

(Testimony of Dale Cockayne.)

is watched very carefully [54] that the expenses of one store is not charged with the expenses of another or the sales of one is not rung up in the sales of another.

Q. Does that policy permit a farm store to pay part of the rental of a department store?

A. No, sir, it does not.

Q. Does that policy require a farm store to pay its share of the bookkeeping and other expenses even though they are incurred in a, that is, in the premises leased by a department store?

A. Yes, sir, it does.

Q. In the bookkeeping setup here in Great Falls, Montana, has the farm store been charged with any per cent of the rent on the premises located at 521, 523, 525 Central Avenue?

A. No, sir, they have not. [55]

* * *

Q. Mr. Cockayne, for the purposes of determining the rental due under the lease dated December 27th, 1943, between Gamble-Skogmo, Inc., and McNair Realty Company, how are the net retail sales determined?

A. Well, of course, first you would take the gross sales figures of any sale that was made in the store regardless of what it was, and it would be less contracting sales, less return sales, less repossession, less employees' discount, in order to arrive at the net retail sales figure.

Q. Would you also deduct from the gross sales, wholesales?

A. Yes, sir.

(Testimony of Dale Cockayne.)

Q. Now what are the wholesales which the Great Falls department store makes?

A. I didn't hear you.

Q. In the Great Falls department store what are your wholesales?

A. What are wholesale sales?

Q. Yes.

A. Wholesale sales as we term them here are made to surrounding dealer stores, such as Fort Benton, Chinook, Stanford, Big Sandy, etc.

Q. Are these sales made at a profit? [56]

A. [No answer in copy.]

Q. Does your store make any wholesale sales to anybody other than other Gamble dealer stores?

A. No, sir, we do not.

Q. Since its inception has the department store here made any wholesale sales to anyone other than Gamble dealer stores?

A. No, sir, they have not.

Q. And has there ever been one sale to anybody?

A. No, sir.

Q. I believe you stated that you also deducted from the gross sales the sales to employees, is that correct?

A. Yes, sir.

Q. What sales did you make to employees?

A. Sales like we would make to anybody else. In other words, any item they wish to buy in the store regardless of what that item might be they are allowed a discount on that item unless it is a special sales item where it is being sold for cost or below and then they are not entitled to a discount from it.

Q. I believe you also stated that from the gross

(Testimony of Dale Cockayne.)

sales you also deducted repossessions before determining the net retail sales. What are repossessions?

A. Repossessions are sales that have been sold on time payment contract and it is necessary for them to be repossessed because of nonpayment. [57]

Q. What were the net retail sales for the first lease year from March 1st, 1944, to February 28th, 1945, as disclosed by your sales reports?

A. \$259,463.65.

Q. What was the rent paid for that lease year?

A. \$5400.00.

Q. In other words, since the net retail sales did not meet at the minimum of \$270,000.00 the Gambles store paid the minimum retail of \$5400.00, is that correct?

A. Yes, sir, that is true.

Q. What were the net retail sales for the second lease year from March 1st, 1945, through February 28th, 1946?

A. \$254,359.05.

Q. Is that the figure disclosed by the sales report made by the Gamble store in Great Falls?

A. Yes, it is.

Q. What was the rent paid for the second lease year?

A. \$5400.00.

Q. What do your records disclose as the net retail sales for the third lease year from March 1st, 1946, through February 28th, 1947?

A. \$567,737.86.

Q. What was the rent paid for the third lease year?

A. \$11,354.76. [58]

Q. And examining these figures it appears that there was a considerable increase in volume in net

(Testimony of Dale Cockayne.)

retail sales during the third lease year; what was the reason for that increase in volume?

A. That is when we had our expansion in Great Falls and we opened up the basement of the department store, and in time the luncheonette was installed.

Q. Who was in charge of that opening?

A. I was.

Q. When you were in charge of it out of which office did you work?

A. From the Minneapolis office.

Q. Is that the headquarters office?

A. Yes, it is.

Q. During this third lease year did Gamble expend any money in improvements and fixtures of the Gamble Department Store?

A. Yes, a considerable amount of money, approximately——

Q. What was the volume of net retail sales according to your sales records for the fourth lease year from March 1st, 1947, through February 28, 1948?

A. \$588,309.90.

Q. What do your records disclose as the rent which was paid on the fourth lease year?

A. \$11,766.20.

Q. What do your records disclose as the total of net retail sales during the fifth lease year from March 1st, [59] 1948, through February 28th, 1949?

A. \$703,402.77.

Q. What was the rent paid on the fifth lease year?

A. \$14,068.00.

(Testimony of Dale Cockayne.)

Q. I understand that the sixth lease year has not yet been completed. What are the total net retail sales disclosed by your records from March 1st, 1949, to through November 30th, 1949?

A. \$469,442.33.

Q. And what rent has been paid for that period through November 30th, 1949?

A. \$9,111.70.

Q. Does that include a \$450.00 monthly payment check paid for the month of November?

A. Yes, it does.

Q. Do you know whether or not that check was accepted by McNair Realty Company?

A. It was not.

Q. What is the total rent that has been paid to McNair Realty Company by virtue of the written lease dated December 27th from March 1st, 1944, through November 30th, 1949? A. \$57,100.66.

Q. What is the net profit or loss which the Gamble Store has made during that period? [60]

* * *

A. \$19,781.33 loss.

Q. Has the Gamble Department Store been operating at a profit or loss since October 1st, 1949?

A. At a profit.

Q. What is the amount of the profit from October 1st, 1949, through November 30th, 1949?

* * *

A. \$5,260.32 profit.

Q. Was the situation on October 1st, 1949, ap-

(Testimony of Dale Cockayne.)

proximately the same as it was on October 3rd, 1949, as far as the profit or loss was concerned?

A. Yes, sir, it was.

Q. Is the Gamble Store now operating at a profit? A. Yes, sir, it is.

Q. I believe you stated a few minutes ago that during the third lease year a considerable amount of money was expended by Gamble-Skogmo, Inc., in putting in improvements and fixtures on the premises leased by the written lease dated December 27th, 1943, is that correct?

A. Yes, sir, that is true.

Q. What was the condition of the department store premises which are those involved in that written lease prior to [61] those improvements?

A. I think Mr. Hill could better answer that, Mr. Williams. I was through here several times but I don't remember exactly the condition of it. I might add in the store opening work our work started after the construction work was finished. We put in the fixtures but we didn't remodel the buildings.

Q. Do your records show what figure was expended for improvements of the premises by the plaintiff Gamble-Skogmo, Inc.?

A. Yes, they do.

Q. What figure was expended during the third lease year? A. \$29,342.46.

Q. In your bookkeeping system under what account is that shown?

A. Prepaid leasehold.

(Testimony of Dale Cockayne.)

Q. What goes into that account?

A. Store improvement.

Q. Any other expenditures? A. No, sir.

Q. How in your bookkeeping is that expenditure charged off?

A. Well it is amortized off over the life of the lease.

Q. Since these were put in in the third lease year I assume it would be amortized off during the balance of the lease yet to run, is that correct?

A. Yes, sir.

Q. As of November 30, 1949, what was the balance still in the prepaid leasehold account?

A. \$14,923.89. [62]

Q. Under normal operation would that figure be amortized over the balance of this lease?

A. Yes, sir, it would.

Q. What would be the effect on that investment of \$14,923.89 if the lease were suddenly terminated?

A. Well it would be an entire loss.

Q. Would any of it be recovered?

A. No, sir. Well, there would be—no, there wouldn't either.

Q. The improvements that are in the prepaid leasehold account, do they go with the building?

A. Yes.

Q. If the lease were suddenly terminated and the landlord took possession, would he obtain the advantages of these improvements?

Mr. Hall: Would he what?

(Testimony of Dale Cockayne.)

Q. Would he obtain the advantages of these improvements? A. Yes, he would.

Q. I believe you stated a few moments ago that in the third lease year a considerable amount of money was expended by Gamble-Skogmo, Inc., for fixtures, is that correct?

A. Yes, that is true.

Q. Do your records show the total amount expended for fixtures at that time?

A. Yes, they do, \$87,107.99.

Q. What fixtures were put into the department store at [63] that time?

A. Well, all of the fixtures that were in the basement. We utilized those, of course, that we were using before, on the main floor, all of the wall shelving and tables and additional cash registers. Any type fixture in the store that figure would cover it.

Q. Did that include the counters?

A. Yes, all of the counters and wall shelving.

* * *

Q. In your bookkeeping practice did you amortize the amount expended for fixtures over the period of the lease? A. Yes, that is true.

Q. As of November 30th, 1949, what do your records show as the amount which has not yet been amortized in the fixture account?

A. \$55,187.40.

Q. In the event the lease were suddenly terminated what would happen to that expenditure?

A. Well that is rather a hard question to an-

(Testimony of Dale Cockayne.)

swer. If we could find another store of the exact dimensions, having the same partitions, the same stairways, the same everything else, they undoubtedly would be moved into that store. If [64] we weren't able to, then they would probably be sent back to the fixture factory and there refinished and sent out as we needed them in other stores.

* * *

Q. In the event you were forced to ship these back to where you make your fixtures, what system would you use to ship them?

A. Well, they are of course screwed together, and as, you understand, they would be unscrewed and boxed up and sent back just as they were when they were sent out here.

Q. Would there be any expense involved in dismantling those fixtures and shipping them back to the factory where Gamble-Skogmo, Inc., manufactures the fixtures?

A. Oh, yes, it would be the labor of taking all of them apart and expense of crating and shipping back there, and there would be a good possibility some of them would have to be refinished after they got there.

Q. What is the situation on the lunch counter?

A. The same would be true there.

Q. Do you know how much it would cost to take these [65] fixtures down and set them up in another store or can you give a reasonable estimate?

A. It would run somewhere between ten and fifteen thousand.

(Testimony of Dale Cockayne.)

Q. What was the nature or what was the amount of inventory as disclosed by your records in the Gamble store on November 30th, 1949?

A. \$178,180.14.

Q. Does that figure represent the cost price of your inventory?

A. Yes, sir, it does, laid down in Great Falls.

Q. If the lease were suddenly terminated, what would happen to that inventory?

A. Well, of course, it would depend entirely upon the length of time, a lot of it could and would be put back into the warehouse and to other stores, and a lot of it would have to be disposed of right here inasmuch as all stores order their own merchandise and it is pretty hard to arbitrarily ship them anything.

Q. I suppose that your inventory is—what is the status of your inventory at the present time as compared with November 30, 1949?

A. Oh, it is lower than that by probably \$60,000.00 lower than that, \$50,000.00 lower.

Q. In the event of a sudden termination of this lease [66] you stated that part of the goods would be shipped back and you say part would be sold here?

A. That is true.

Q. Would they be sold at their regular price?

A. No, you would have to—I think it would be fair to say if you got sixty cents on the dollar taking it on the whole, you would have done a good job. It would depend on the length of time you had to do it, of course.

(Testimony of Dale Cockayne.)

Q. Have you ever conducted any of these sales where you had to sell merchandise in a hurry?

A. Yes.

Q. And has your experience been that you would be lucky to obtain sixty cents on the dollar on such sales?

A. That is right.

Q. What would you estimate would be the loss to Gamble-Skogmo, Inc., on the present inventory in the event the lease were suddenly terminated?

A. It would be approximately \$50,000.00. [67]

* * *

Q. Do you know of any other situation which would happen in the event of the termination of this lease at the present time?

A. Your accounts receivable, there would have to be something set up to handle that until it was closed out, also the amount of people we have employed, and the goodwill we have built up over the period of years we have been here; how you would measure that in dollars and cents, I don't know.

Q. You stated people would be unemployed, what people are those?

A. The folks employed there by us now unless they could find other employment.

Q. Do you have any trained personnel?

A. Oh, yes, we have.

Q. What would happen to them?

A. I really can't answer that any more than, of course, the amount of money we have spent in training them would certainly be down the drain. It

(Testimony of Dale Cockayne.)

costs considerably, if I can use that term. In the retail business it costs you one thousand dollars on every employee you have to develop that employee to your way of doing business regardless whether, regardless [68] of the experience he or she might have had prior to the time she goes to work for us.

Q. Do you have another location in Great Falls in which Gamble-Skogmo, Inc., could operate?

A. Not to my knowledge.

Q. How long would it take you to set up another Gamble-Skogmo Store in the event you could find such a location?

A. Oh, 60 to 90 days. [69]

* * *

Q. On the date of October 3rd, 1949, what was the [70] situation as to the state of repair of the exterior portions of the premises leased from the McNair Realty Company at 521 Central Avenue?

A. Everything was in good shape excepting the roof.

Q. What was the matter with the roof?

A. It had about three or four holes in it.

Q. Did it leak? A. Yes, sir.

Q. How long had that condition existed?

A. Ever since I have been here in September of 1947.

Q. Had the defendant McNair Realty Company been advised of that situation?

A. I think it had been.

Mr. Hall: May it please the court, I can't find in the pleadings any issues in connection with these

(Testimony of Dale Cockayne.)

matters concerning which counsel is inquiring so that I know nothing about any claim heretofore made to any leaks in the roof or anything of that character.

The Court: Whether he knew, whether the defendant had been notified of the leaking of the roof? You didn't say positively?

A. I said I think that they have.

The Court: Oh, you think they have.

Mr. Williams: If the court please, the reason for this line of questioning is that the defendant has asked for forfeiture of this lease, and if they are going to come into [71] equity and ask for forfeiture of a lease to which they are a party, they must be able to show that they have performed fully so they can come into a court of equity with clean hands. If on October 3rd they asked to have this lease terminated they are in default on some of the provisions of the lease itself, then they are not justified equitably in declaring a forfeiture.

Mr. Hall: Now, upon the basis of counsel's statement, there is absolutely nothing in the complaint concerning that matter, is there?

Mr. Williams: No.

Mr. Hall: Not a thing and do you or are you suggesting to the court now we are in a court of equity?

Mr. Williams: Yes.

Mr. Hall: Well, I don't think we are, if the court please. My study of the cases especially in federal courts is that this is a special statutory action,

(Testimony of Dale Cockayne.)

neither in law nor in equity. It differs somewhat from ordinary equity actions in that, for instance, on a question of fact if your Honor desired, you could call a jury here or the litigants could require the assistance of a jury, and the whole thing is, it seems to me, we are going far afield for any trial. It's claimed for the first time in my knowledge in any litigation at least that there has been a default in the lease so far as the lessor is concerned, and as counsel admits there [72] is nothing in the pleadings at all.

The Court: I suppose the usual terms are incorporated in the lease in which the lessor did promise to keep the premises in a state of repair or that they were at the time of leasing in a state of repair and would continue to keep the property in a state of repair. Those are the usual terms incorporated. I haven't read the lease to see if they are in this one.

Mr. Hall: I think that is in paragraph five as to the obligations of the lessor with reference to making repairs and keeping the premises in good condition.

The Court: Well, I don't know what bearing it may ultimately have on the outcome of this case, but I will let it go in subject to your objection, although he hasn't stated positively about it whether the defendant had any notice or not. He thinks they may have. That is not a very strong showing. Well, go ahead, let's get on.

Mr. Williams: I believe that is all, Mr. Cockayne.

DALE COCKAYNE

Cross-Examination

By Mr. Hall:

Q. Mr. Cockayne, the lease would have expired on its own terms in the year 1954, would it not?

A. Yes, I think that is true. [73]

Q. And at that time unless the lease was renewed and a new lease entered into the Gamble store would have been compelled to remove from the premises in question?

A. Yes, that is true.

Q. And to have left there all of the remodeling that Gambles have done in the store?

A. That is correct.

Q. And whether or not that would be to the advantage of the landlord would be a question?

A. Yes.

Q. In other words, there were two stores there, were there not, originally?

A. Yes, sir, there were.

Q. And a part of the remodeling was in connection with the putting of the two stores into one store?

A. That is true.

Q. There was also some remodeling done with reference to the entry to what now is called the basement or downstairs store?

A. Yes, sir, that is true.

Q. So that if the landlord desired to put the premises back into two or three stores, it would be to his disadvantage and not his advantage?

A. That is true.

Q. And the same situation is true with reference

(Testimony of Dale Cockayne.)

to the fixtures at the expiration of the lease you have to move them out? A. That is true.

Q. And you would have to take them down? [74]

A. That is correct.

Q. And you would have to ship them?

A. That is correct.

Q. Unless you were able to use them in town?

A. That is correct.

Q. So the termination of the lease four years from now would have the same effect so far as remodeling is concerned as a termination this year?

A. Yes, sir, that is true.

Q. Now you suggested to Mr. Williams perhaps if you had ninety days' notice that would work to the advantage of Gamble Stores, that is to say, you would be able to dispose of merchandise possibly at a profit?

A. It would be possible if you had ninety days to possibly dispose of the goods at a profit, yes, sir.

Q. And I would suppose then that you would order no new merchandise after receiving the notice?

A. Yes, you would if you were going to make it profitable.

Q. You would keep on ordering merchandise?

A. Yes, sir.

Q. Now when was it that you received the notice in question that we have been talking about in this case? You told Mr. Williams, I believe, about the termination notice?

A. I believe it was October 3rd.

(Testimony of Dale Cockayne.)

Q. . October 3rd, and that is almost ninety days ago, is [75] it not? A. That is true.

Q. And you are still in possession of the premises? A. Yes, sir.

Q. So that you have had approximately ninety days' time up to date? A. Yes, that is true.

Q. And, as I understand you, you intend to stay in the store until some decision of the court is rendered that the lease is terminated?

A. Yes, that is true.

Q. Have you ordered additional merchandise since the notice of termination was given to you?

A. Yes, sir.

Q. And have sold considerable merchandise?

A. Yes, sir.

Q. Now, when did you first become familiar with the lease on the Great Falls store?

A. That would be a little difficult to answer. I would say sometime in 1945.

Q. That is while you were acting as a supervisor for Gamble-Skogmo, Inc., and working out of the Minneapolis office?

A. Yes, sir, that is true.

Q. And do you know a man by the name of Mike F. Hoben? A. Yes, sir.

Q. Who is he?

A. He used to be in charge of the real estate department in Minneapolis.

Q. And was also in charge, was he not, at the time this [76] lease was entered into in December, 1943? A. Yes.

(Testimony of Dale Cockayne.)

Q. Who took his place? A. Mr. Hill.

Q. That is William T. Hill who sits here at the table? A. Yes.

Q. And he is the gentleman who works out of the Minneapolis office? A. Yes.

Q. Mr. Hoben was in general charge, was he not, of all real estate transactions for Gamble-Skogmo, Inc.? A. Yes, sir.

Q. And Mr. Hill has taken his place now?

A. Yes, sir.

Q. How long has Mr. Hill been in Mr. Hoben's place?

A. This would be an estimate, but I would say approximately a year.

Q. Mr. Hoben had an unfortunate circumstance where he had his legs removed and has been ill since? A. Yes, that is true.

Q. Are you generally familiar with the Gamble leases? What I am getting at, Mr. Cockayne, is the leases are on a form provided by Gamble-Skogmo, are they not? A. That is true.

Q. A portion being in print and a portion in the spaces typed in? A. Yes, sir, that is true.

Q. And on the back page of Plaintiff's Exhibit 1 you will find Mr. Hoben's name, do you not? [77]

A. Yes.

Q. M. F. Hoben? A. Yes.

Q. And the initials? M.F.H.? A. Yes.

Q. Prepared by M.F.H., submitted for approval by M.F.H.? A. Yes, that is correct.

(Testimony of Dale Cockayne.)

Q. So you would gather from this Mr. Hoben prepared the lease? A. Yes, I would.

Q. In his capacity as the man in charge of the real estate transactions for Gamble-Skogmo, Inc.?

A. Yes, sir.

Q. You became manager here in what year, Mr. Cockayne? A. 1947, September.

Q. September, 1947? A. Yes, sir.

Q. Prior to that time, however, you had been more or less familiar with the operations here in Great Falls? A. Yes, sir.

Q. Through several trips you made as supervisor and in other capacities? A. Yes, sir.

Q. And when was it that Gamble-Skogmo first entered into the farm machinery business?

A. In 1947.

Q. Would that be in January, 1947, prior to your coming to Great Falls? A. Yes, sir.

Q. And had they contemplated entering into that business prior to January 1st, 1947?

A. I can't answer that.

Q. You don't know then whether they had made any arrangements [78] with reference to the sale of farm machinery here in Great Falls or in the Great Falls territory prior to January, 1947?

A. No, sir, I don't know.

Q. Your first contact with the matter was when you came here as manager in September, 1947, when the farm machinery operations were a going concern? A. Yes, sir.

Q. Now, Gamble-Skogmo operate their stores on

(Testimony of Dale Cockayne.)

the basis of several departments, do they not, Mr. Cockayne? A. Yes, sir.

Q. And those departments are called units, are they not, for bookkeeping purposes?

A. That is true.

Q. And as I think you told Mr. Williams on your direct examination the regular department store business is designated unit No. 1? A. Yes.

Q. Or department No. 1?

A. Yes, sir, that is true.

Q. And the lunch counter is called Unit No. 2?

A. Yes, sir.

Q. And what is unit No. 3?

A. I am really not familiar with 3 and 4. I believe, however, it is a drugstore and—well, I can't even you give you an idea.

Q. I think that is what you told me on your deposition, either 3 or 4 constituted a drugstore department. You do not have a drugstore department in your operation?

A. No, sir, we don't. [79]

Q. And unit No. 5 is the farm, what they call farm department or farm unit, is it not?

A. That is right.

Q. Do you know of your own knowledge when the farm unit or farm department was first set up by Gamble-Skogmo, in what year?

A. In the company as a whole?

Q. In the company as whole, yes.

A. I would say sometime in 1945 or 1946. I can't give you a definite date as to that.

(Testimony of Dale Cockayne.)

Q. And that was set up then like any other department or unit of the store operations?

A. Yes, that is true.

Q. Now were you familiar with the time that Gamble-Skogmo arranged to rent the property facing on First Avenue North here in Great Falls immediately to the rear of the department store at 521, 523, 525 Central?

A. I am not familiar with that, no, sir.

Q. That was being rented by Gamble-Skogmo at the time you came here? A. Yes.

Q. What is all on that property, Mr. Cockayne?

A. Right today?

Q. Yes.

A. Right today there is furniture, floor covering, and rebuilt motors in there now.

Q. Oh, I see what you mean. What I was getting at first, Mr. Cockayne, was the character of the buildings or [80] improvements upon that property?

A. Well, it is just a lot and tile building with a so-called balcony all the way around it on the inside of the building.

* * *

Q. Well, in any event, the only improvement upon the lot immediately north across the alley from the premises in question here is this warehouse?

A. That is true, yes, sir.

Q. That is, it has no display windows or anything of that character? A. No.

Q. And the remainder of the property is a vacant lot? A. That is true.

(Testimony of Dale Cockayne.)

Q. It would be more specific to say the building was on First Alley North in lieu of First Avenue North? A. That is true. [81]

Q. You say you now have in that warehouse furniture and things of that character?

A. That is true.

Q. That is, you are using it as a warehouse?

A. Yes.

Q. And how long has that situation been true?

A. Well, off and on ever since I have been here.

Q. That is throughout the period that Gambles have had the warehouse under lease there has been furniture and other things stored in there?

A. Yes, sir, that is correct.

Q. For warehouse purposes? A. Yes.

Q. And that was in connection with your operation of the department store? A. Yes.

Q. You carried furniture as a part of the operations of the store or department No. 1?

A. Yes, sir.

Q. And would that be true all of the time you have been manager of the operation? A. Yes.

Q. Anything else in there other than furniture during the time you have been manager?

A. All of the farm parts.

Q. All of the what?

A. All of the farm parts.

Q. And those would be repair parts and replacement parts for the larger farm machinery?

A. That is correct, for the implements which we sell.

(Testimony of Dale Cockayne.)

Q. I am not entirely clear, Mr. Cockayne, as to what [82] you mean by implements. I have been used to calling the larger things such as combines and tractors and mowers and wagons as farm machinery, and implements as shovels and things of that character.

A. We reverse it and in order to make it easier for us we call them implements.

Q. Everything is implements, is that right?

A. The parts carried were parts to service the implements we sell.

Q. And by implements you mean tractors, combines?

A. Tractors, combines, mowing machines, manure spreaders.

Q. And by repair parts you mean parts to replace parts of those machines that have been worn out?

A. Yes.

Q. Or injured in some fashion?

A. Yes.

Q. Now is there anything else in this warehouse other than furniture and the parts?

A. No, sir.

Q. Now where were the machines themselves kept, the farm implements?

A. In the lot directly behind that building, and in the building and lot that we rented from Roy Anderson Company at 23rd Street and 9th Avenue North.

Q. Can you tell me how that property was rented from Roy Anderson?

A. No, sir, I can't.

(Testimony of Dale Cockayne.)

Q. Was that being rented at the time you came out here? A. Yes. [83]

Q. So that would be some time prior to September, 1947? A. That is true.

Q. There was no building for the display of the farm machines? By machines I mean tractors, combines and things of that sort. There was no building, was there?

A. Well, there was no building with glass windows in front of it if that is what you mean? We used the building at Roy Anderson's for displays and sales and also the lot directly in front of the building.

Q. Was there a telephone in the warehouse?

A. Yes, sir, there was.

Q. Across the alley from the department store?

A. No. There was a telephone at the Roy Anderson warehouse.

Q. What was the telephone number?

A. Roy, do you know? I can't tell you.

Q. Don't answer it if you don't know.

A. I don't know.

Q. I was wondering if that telephone was an extension of the telephone in the department store?

A. No, sir, it was not.

Q. Do you know when the telephone was put in the building up at Roy Anderson's?

A. It was after I came out here. It wasn't here when I came. [84]

Q. By the way, what is the number in the store?

A. 4384.

(Testimony of Dale Cockayne.)

Q. I understand you had no telephone or no extension in the small warehouse across the alley?

A. That is true.

Q. Now, in a general way, was there anything stored in this warehouse along the line of tractor tires and things of that character?

A. Occasionally.

Q. Where were the items such as tractor tires displayed and sold?

A. In the department store in the tire department.

Q. In the department store? A. Yes.

Q. They were not carried as a part of your farm store then? A. No, sir.

Q. Were the replacement tires carried as a part of the farm store operation? A. No, sir.

Q. No tires at all?

A. No, sir. Excuse me, let me rectify that. Now, trailers, there's some items come with tires on them, rubber tires.

Q. That would be true of tractors, would it not?

A. Yes, that is right.

Q. And trailers and things of that sort and wagons?

A. Yes. And I believe at one time we did have some implement tires there.

Q. When you say "there," you mean in the small warehouse [85] across the alley? A. Yes.

Q. And those were carried then, the tires and things were carried as a part of your farm store operation?

(Testimony of Dale Cockayne.)

A. Those that I just now mentioned, yes.

Q. Now, of course, you did a good deal of advertising, did you not, so far as your store was concerned and so far as each one of the units of your store were concerned? A. Yes, sir.

Q. And where did you direct the public to go in the advertising?

A. In most cases the department store.

Q. You gave the number, did you not, 521, 523, 525 Central Avenue? A. Yes.

Q. And in many of the advertisements there is a reference to Mr. Al Hunt, or "see Al Hunt"? I believe you mentioned Mr. Hunt's name this morning in the testimony? A. Yes, sir.

Q. As I understand it he was the manager under you of the farm department?

A. That is true.

Q. You, however, as manager of the store operations in Great Falls, had supervision of all three departments, did you not?

A. Yes, sir, that is true.

Q. You were the boss? A. Yes, sir.

Q. And I believe in your deposition you told me that you received a commission upon sales made by all three [86] departments?

A. Yes, sir, that is true.

Q. And that is true up to the present time, is it not? A. Yes, sir.

Q. Now you told me that the advertisements which were put in the papers by Gambles directed customers to go to the department store?

(Testimony of Dale Cockayne.)

A. Yes, sir.

Q. And when a customer came into the department store did he find Mr. Hunt there?

A. No, sir, he did not.

Q. And was he directed to go anywhere by someone in the store?

A. He was directed to go to the building on the alley as you stated on First Avenue North.

Q. So he first came in the department store and was directed to go across the alley?

A. That is true.

Q. And there he found Mr. Hunt?

A. That is correct.

Q. Now did the farm store carry any cash, petty cash over there in the warehouse?

A. During the parts of the season, during the busy season.

Q. During the part of a year? A. Yes.

Q. And the busy season would be three or four months out of the year? A. Yes.

Q. And did that petty cash account amount to anything in money? A. \$20.00.

Q. And where did that money come from? [87]

A. From the store.

Q. And who gave it to him?

A. Either myself or the office manager.

Q. And what was done at night with that petty cash fund?

A. It was checked back in to the store.

Q. And I believe you said something when a large check came in to the farm department it was

(Testimony of Dale Cockayne.)

immediately brought over to the business office?

A. In most cases it was, yes.

Q. That would be a check in payment for a tractor or some large machine? A. That is true.

Q. But the cash probably was not brought into the office until just about the time the store closed, is that right? A. That is true.

Q. Now, where was the business office for all three of the departments?

A. On the balcony of the department store.

Q. And how many employees did you have there in the business office?

A. Oh, anywhere from four to six or seven.

Q. I can't hear.

A. It would be say approximately five.

Q. It would average five?

A. That is true.

Q. And the business operations of the entire store, that is, all three departments, was handled there from that business office?

A. Yes, the money was accounted for there. [88]

Q. Not only that the orders were made from there for goods, were they not?

A. Yes and no.

Q. Well, that doesn't mean very much to anyone. You understand what I mean?

A. Yes, and it is true and it isn't true.

Q. Let me get at it this way. You do, as manager, order goods, I assume, practically every day of the year? A. Yes, sir.

Q. And from where do you order those goods?

(Testimony of Dale Cockayne.)

A. From the department that we might be ordering. In other words, we have a stock record system and when we order merchandise we order it because merchandise has been sold.

Q. I see. From where do you order it?

A. And I say from the department from which we are ordering.

Q. Of course, I am confused.

A. Let me explain it this way. If we were going to order shoes, you would first take your stock record book and count the shoes on hand and then lay this book down, and usually—well, you would write the orders buying back the shoes that you have sold.

Q. And from where would you get those shoes?

A. From Minneapolis.

Q. Well, that is what I am trying to get at. You would order it from the headquarters of the Gamble-Skogmo some place? [89]

A. That is true.

Q. They maintain a warehouse here in the State, do they not?

A. That is true.

Q. And your order would perhaps be filled out of one of those warehouses?

A. That is true.

Q. But your order would go direct from on the floor?

A. Well, not all cases.

Q. And who would make that order?

A. The department head involved.

Q. And each one of the departments has a department head, is that right?

A. Yes.

Q. Just the same as Mr. Hunt is the head of the department store and someone else is the head of the various departments in the department store?

(Testimony of Dale Cockayne.)

A. It isn't quite that way. There is a man in charge of the main floor and all of the clothing, and another man in charge of the basement.

Q. Now do those orders have to be approved by you?

A. No, sir.

Q. Do they go to the business office?

A. Yes, for mailing.

Q. And do you do any checking up there in the business office?

A. Quite often I will, yes.

Q. Now, are any goods handled by catalog so far as Gamble is concerned. [90]

A. You mean where the customer would come in or send in an order?

Q. The customer would come in and look at a catalog?

A. It would be very very little, if any.

Q. But you do, I assume, and particularly in connection with farm machinery, have a large number of brochures and things of that sort describing machines like automobiles are described?

A. Yes.

Q. Telling what they do and how they are made and what for?

A. Yes, sir.

Q. And where are those kept?

A. All over the store.

Q. All over the department store?

A. Right, and required——

Q. And if a man came into the department store with reference to some particular farm machine or

(Testimony of Dale Cockayne.)

replacement, he could obtain one of those brochures or advertisements there in the department store?

A. It wouldn't have been improbable but in most cases he would have been referred to Mr. Hunt across the alley.

Q. But nevertheless they are kept for customers in the department store? A. There's books.

Q. Now from what place where the employees paid, from the business office?

A. The checks were made there.

Q. Were made and delivered from there to various [91] employees? A. Right.

Q. And that practice was true with reference to all the employees of all of the departments?

A. Yes, sir, true.

Q. During the period of time that you have been manager? A. Yes, sir.

Q. Now, do I understand in the business office all of the records of the Gamble operation here in Great Falls are kept and maintained?

A. All of the sales records.

Q. Well, what other records are there?

A. Stock records.

Q. By stock records you mean the inventory that is kept up? A. Yes, sir, that is true.

Q. What other records besides the stock records and sales records are there?

A. Demonstration records.

Q. What do you mean by that?

A. Merchandise out on demonstration, radios, refrigerators, etc.

(Testimony of Dale Cockayne.)

Q. That is some sort of receipt showing——

A. Showing where the merchandise is, and also records of that in stock.

Q. Where are these demonstration records kept?

A. In the department involved. [92]

Q. And is any copy sent up to the business office?

A. No, sir, there isn't.

Q. Nothing comes to the business office like an actual sale has been made of the particular item involved?

A. That is true.

Q. And then as soon as that sale is made whether on credit or by cash the record of that transaction comes to the business office?

A. Yes, that is true.

Q. And when does it come to the business office?

A. The following morning when the cash registers are checked.

Q. And that would be in the form where the transaction is a credit or——

A. That would be a cash sale.

Q. That would be simply a sale slip?

A. Well, it would be a record on the cash register tape of the sale.

Q. Well, do you also in the business office check the tape against the individual sales slips?

A. Yes, sir.

Q. And the sales slips and the tape comes into the business office?

A. There is no sales slips.

Q. You don't have sales slips?

A. No, sir, automatic with the cash register.

Q. Now in the event of a credit sale? [93]

(Testimony of Dale Cockayne.)

A. That is rung up in the office.

Q. It is what?

A. It is rung up in the office, in the office cash register. An okay is given to the party involved and they go back down and pickup their merchandise.

Q. So that in the event a person comes in there and wants to charge or buy on contract, that must be approved by the business office?

A. Yes, sir.

Q. And if it is a contract, as I understand you, the contract may be prepared out on the scene, that is, out where the purchaser lives in the event of the farmer who desires a demonstration but it must be approved by the business office?

A. In all cases, yes.

Q. Now, after the business office has received the sales records for a particular day, and I am including all three departments, then what is done by the business office with reference to those sales?

A. They are recorded on a report and one copy is kept in the office and one copy is forwarded on to Denver.

Q. To Denver?

A. Yes, sir.

Q. And are the sheets that you identified as being the records of Gamble-Skogmo covering the sales and operations over a period of years, are they made up in Denver?

A. Yes, sir, they are.

Q. And a copy is sent to you, is that right? [94]

A. Yes, sir.

Q. And a copy goes to the Minneapolis office?

(Testimony of Dale Cockayne.)

A. Yes, sir.

Q. And a copy maintained in Denver?

A. Yes, sir.

Q. Are these records made up daily by the Denver office? A. No, sir.

Q. They are made up daily, however, by the business office here in Great Falls? A. Yes, sir.

Q. Covering all three departments?

A. Yes, sir.

Q. And at least at the end of every month a copy of the month's business, record of the month's business, including income and expenses is sent to you?

A. Yes, sir.

Q. And that is what we have here on this table?

A. Yes.

Q. Covering the period 1943, I think you said, down to sometime in 1949?

A. Yes, sir, that is true.

The Court: We will take a recess. (3:20 p.m.)

(Court resumed, pursuant to recess, at 3:45 o'clock p.m., at which time all parties and counsel were present.)

DALE COCKAYNE

resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Hall:

Q. Mr. Cockayne, was there a cash register in

(Testimony of Dale Cockayne.)

the small warehouse across the alley from the main store? A. At times there was, yes.

Q. During the busy season? A. Yes.

Q. Otherwise all the cash transactions were handled in the department store? A. Yes, sir.

Q. And when there wasn't a cash register there the sales slip was made out in the warehouse?

A. Yes.

Q. And brought across the alley to the main store? A. Yes.

Q. And there the transaction was completed?

A. Yes, sir.

Q. And that was true for the greater part of each year? A. Yes, sir.

Q. Who handled the advertising for the Gamble operation here? A. I did.

Q. You were the advertising manager as well as the——

A. No, Gordon Williams does our advertising for us but it was under my supervision.

Q. All advertising was under your direct supervision? A. Yes, sir.

Q. And you assisted, did you, in getting out that advertising? A. Occasionally, yes, sir. [96]

* * *

Q. Will you give me the net amount of wholesale sales made by department No. 1 for the month of June, 1949? A. \$834.97.

Q. That is \$834.97? A. Right.

Q. And the net retail sales \$48,605.04, and those

(Testimony of Dale Cockayne.)

are totals which we would use in ascertaining the 2% rental, are they not?

A. No, sir, they are not.

Q. All right, now what would you eliminate from those [97] totals? A. The wholesale sales.

Q. And why do you eliminate entirely the wholesale sales?

A. It is so stipulated in the lease.

Q. What do you mean by that, Mr. Cockayne?

A. As I understand it, I am not a leaseman.

Q. I understand but I just wanted an explanation from you what you mean that they were eliminated from the lease terms?

A. First, it is a sale to another Gamble store.

Q. Let me ask you about that, Mr. Cockayne, there are more than one variety of what we call Gamble stores, are there not?

A. Yes, that is true.

Q. There are the regular Gamble Stores operated by Gamble-Skogmo, such as the Great Falls store? A. Yes.

Q. And various places in Montana and elsewhere? A. Yes.

Q. In addition there are smaller stores operated by individual owners on some sort of franchise arrangement to use the Gamble name? A. Yes.

Q. Now how do you designate between those two stores in your wholesale sales?

A. Well, these wholesale sales here, Mr. Hall, would represent sales to that type store.

Q. Which type store, to a dealer type store, that

(Testimony of Dale Cockayne.)

is, an individual? A. Owned store. [98]

Q. Not owned by Gamble?

A. No, sir. A Gamble store. A transfer of merchandise to a Gamble store is merely an inventory control problem. In other words, if I transfer a set of tires, or a refrigerator would be a better example, from here to Havre, it is taken from my inventory and is put on the Havre inventory.

Q. Let me ask you this question. Is the Havre store the same species as the Great Falls store?

A. Yes, sir.

Q. Now let's go to some smaller place where there is a dealer, an individual person operating under the Gamble name? A. Yes.

Q. Can you give me one?

A. Yes, Fort Benton.

Q. Fort Benton? A. Yes.

Q. And does this represent any transfers to such a dealer? A. Yes, it does.

Q. And did you exclude that from the goods under the 2% rental provision?

A. Yes, that is what this sale here is is sales to those stores.

Q. To that species of stores?

A. Yes, sir.

Q. Not to the regular Gamble-Skogmo stores?

A. Yes, sir.

Q. You said yes, sir?

A. This is sales represented to a dealer sale.

Q. Operating under the name of Gamble? [99]

A. Operating under the name of Gamble and

(Testimony of Dale Cockayne.)

does not represent transfers of merchandise to any branch store. [100]

* * *

Q. In your direct examination you spoke of the costs which were charged against the various departments, do you recall that? A. Yes.

Q. I think you said there was a cost set up for bookkeeping? A. Yes.

Q. Well, that isn't an actual payment, is it? That is just a bookkeeping transaction; that is, one department doesn't pay somebody else for keeping books for it?

A. Well, let me say, and I think I said this morning, our purpose in keeping the three sets of books is to know exactly where we are on those three different units at all times.

Q. In other words, you want to see if any particular unit is operating at a loss? A. Yes.

Q. And if it is operating at a profit, what the profit is? A. Right.

Q. But that is all compiled in the one store operation, is it not?

A. Yes, I would say that it is.

Q. In other words, you don't actually charge for your department No. 5 so much for keeping books, except as a bookkeeping transaction?

A. That is true.

Q. The money you take in from the three departments goes into one pot, does it not?

A. Yes, sir.

Q. As a matter of fact, Department No. 5 never

(Testimony of Dale Cockayne.)

had [101] any bank account, did it, during the entire time it was in operation?

A. I can't say this for sure, however, I think it did have. On the origination of several of those departments entirely separate bank accounts, separate manager, separate everything was set up at some of the points.

Q. Where, in Great Falls?

A. I don't know whether it was here or not.

Q. I simply glanced at a large number of these sheets and department No. 5 was without a bank account.

A. You could tell from there very quickly.

Q. Did department No. 2 have a bank account?

A. Not since I have been here.

Q. I am talking about all of them.

A. Yes, sir.

Q. Just one store has a bank account?

A. Yes.

Q. Out of that you are paid? A. Yes.

Q. Advertising paid? A. Yes.

Q. All costs of operation paid? A. Yes.

* * *

DALE COCKAYNE

Redirect Examination

By Mr. Williams: [102]

Q. Mr. Cockayne, you testified a few minutes ago on cross-examination that the warehouse on First Avenue North, which is not the premises involved

(Testimony of Dale Cockayne.)

in this lease, occasionally stored tractor tires, did you not? A. Yes, I did.

Q. Would you state that some of those tires were occasionally sold under department No. 1, which is the department store?

A. The tractor tires belonged to department 1 and were sold in the department store.

Q. As such then do I understand the tractor tires are not farm implements or farm parts and are not part of unit 5?

A. That is true. Unit 5 consists of implements and parts for the implements that are sold.

Q. I understand that occasionally tractors come equipped with tires, as such are they considered, are the tires considered part of unit 1 or part of unit 5?

A. Unit 5.

Q. I believe you stated on direct examination that there had never been an item of unit 5 sold in the department store?

A. That is true. [103]

* * *

Q. I believe you stated on cross-examination that all orders went through the business office in the department store?

A. Merely for the purpose of mailing, yes.

Q. What is the situation on orders, what was the situation upon farm store orders?

A. The same.

Q. What do you mean by the same?

A. That they were just dropped in the mail basket and taken to the post office with the rest of the letters.

(Testimony of Dale Cockayne.)

Q. Who writes up the orders on farm store orders?

A. I can better say Al approves them.

Q. By Al, you mean Al Hunt, the farm store manager?

A. Yes, sir.

Q. After he approves them, what does he do with them?

A. Puts them in the mail.

Q. In a sealed envelope?

A. I can't answer that, Carter.

Q. What I am getting at, do you yourself supervise or make out these orders on farm store purchases?

A. No, sir, I do not.

Q. Do I understand you to say when they go through the business office they are merely dropped in the mail bag there [104] and not examined by you personally?

A. That is true.

Q. I believe you stated on cross-examination that the employees who worked for the farm store were paid and the checks made out in the business office located in the department store?

A. That is correct.

Q. Who determines how large or how small those checks are?

A. Al Hunt. He keeps the time for them and turns it in and the girl writes the checks, and I sign them or Bob Grubber would sign them.

Q. Then the only thing in that procedure is merely the stenographic work of writing the checks and the formal signature?

A. That is true.

Q. Do you know the approximate total square

(Testimony of Dale Cockayne.)

feet involved in the department store leased by that written lease dated December 27th, 1943?

A. Oh, I would say approximately 20,000 square feet.

Q. And how many square feet are in the business office which we have been discussing, composing the manager's office, sales office and credit office?

A. I would say it is approximately ten by thirty, about 300 square feet.

Q. Does the farm store have a connection with any other part of the department store except the business office? Does [105] it transact business with any other branch or unit of the department store located at 521 Central Avenue?

A. No, sir, it does not.

Q. There has been some discussion here of wholesale sales, does the Great Falls Gambles store have a general wholesale business?

A. No, sir. We frown on what we already have.

Q. And what is the nature of your wholesale business?

A. I can best tell you that, Carter, by attempting to explain how we function. We have a warehouse in Billings, which is set up to take care of these dealer operations around through the territory, and we also draw our own merchandise from that warehouse. We draw some of our merchandise; the balance of it, of course, comes direct from the vendors. The sales that we make to dealer stores, as we call them, are sales sometimes on merchandise in which we are overloaded on and are extremely

(Testimony of Dale Cockayne.)

anxious just to get our money back out, or a sale when he becomes distressed. In other words, a man will write down or call up and say, rush me out a tire or tires, from Fort Benton so we will put a tire on the bus and he will have it in Fort Benton that evening. We do not encourage it in any way, shape or form because we are set up on that in Billings, and when you sell it at wholesale prices you can't run a retail store and do it, and it is merely an accommodation and we frown on it [106] except when we are overloaded on merchandise and attempt to sell it to them just to get our money back, which has happened in this store, but it isn't a common practice. We don't like the business and we don't want it.

Q. Does the Great Falls Gamble store make any profit?

A. Actually you lose money; that is why I say we don't want it.

Q. As I have understood you these sales are all transfers of merchandise to the other Gamble stores, is that correct?

A. Other Gamble dealer stores.

Q. Do these Gamble dealer stores bear the name of Gambles?

A. Yes, sir, they do.

Q. Without exception?

A. Yes, sir.

Q. I believe you stated that the part of the book-keeping expense was charged to unit 5, is that correct?

A. As close as humanly possible we charge all the expense to the store involved, yes, sir.

(Testimony of Dale Cockayne.)

Q. And also you stated all the money went into a common fund? A. That is true.

Q. After the money goes into the fund here what happens to it? A. It is put in the bank.

Q. And from there where does it go?

A. The transfer checks are now to Continental Illinois Bank in Chicago. I believe that changes periodically but I think that is right. [107]

* * *

DALE COCKAYNE

Recross-Examination

By Mr. Hall:

Q. As I understand you, Mr. Cockayne, you say during the period of time you have been manager tractor tires have been stored in the small warehouse across the alley from time to time?

A. In some cases, yes.

Q. Yes, and that those tires belonged to department No. 1? A. Yes, sir.

Q. And you did tell me that furniture had been?

A. Yes, sir.

Q. And was now being stored there?

A. Yes, that is true.

Q. And that belongs to department No. 1?

A. Yes, sir.

Q. And has at all times belonged to department No. 1? [108]

* * *

Q. Now a question or two I intended to ask you

(Testimony of Dale Cockayne.)

on your original cross. You said that Gamble-Skogmo had quit the farm department?

A. Here in Great Falls, yes, sir.

Q. Only in Great Falls?

A. Yes, sir. [109]

Q. They are still operating the farm department elsewhere? A. Yes.

Mr. Hall: I think that is all.

DALE COCKAYNE

Re-redirect Examination

* * *

Q. You stated on cross-examination that the amount which was expended for remodeling would ultimately go to McNair Realty Company at the termination of the lease in 1954, would it not?

A. Yes, sir.

Q. I believe you also stated on direct examination that that amount expended for prepaid leasehold or improving the premises was amortized during the life of the lease, was that correct?

A. Yes, sir, that is true.

Q. Then what would be the status of that account when the lease terminated by its own terms of 1954?

A. It automatically would have amortized itself off. Actually we call it a part of our rent is actually what it amounts to.

Q. Would you explain that statement? [110]

A. Assuming we spent to make it easier figuring \$5,000 and we had a five-year lease on a building in which we paid \$1,000 a year rent through the

(Testimony of Dale Cockayne.)

actual lease with that our rent would be \$2,000 a year, so come the end of the five years the work we had done would have automatically amortized itself off and so far as we are concerned would have been paid for.

Q. But if the lease were terminated prior to the expiration?

A. Then you would have lost that amount of money, that is true.

Q. I also understand that when the lease would terminate by its own terms Gamble-Skogmo would have the cost and expense of removing the fixtures, is that right? A. That is true.

Q. What would be the situation as far as the amortization of those items at the termination of the lease?

A. Well, it would be the same as the prepaid lease, Carter. In other words, there is a difference in the way those two accounts are amortized off, I believe. I think Mr. Hill can give you the exact way that is done. I do know the prepaid leasehold is amortized over the time of the lease and fixtures and furniture amortized over a ten-year period.

Q. And if the lease terminated by its natural terms in [111] 1954, you would then have had four years more use of those fixtures, is that correct?

A. That is true.

Q. And to a large extent they would be written off your books? A. That is all.

* * *

DALE COCKAYNE

Re-recross-Examination

By Mr. Hall:

Q. This amortization matter is purely and simply a matter of bookkeeping, isn't it?

A. Yes, sir, it is.

Q. You just take an arbitrary amount and charge it off each year?

A. Not an arbitrary amount, Mr. Hall. If we spent so much money, of course, for tax purposes and so forth you have to be actually careful there so it is charged off during or over the life of the lease.

Q. But you won't over amortize for tax purposes, is that true? A. That is true.

Q. And that is included in the item shown upon these store statements and included in the items in store statements under light and heat?

A. No, it is in on prepaid leasehold about four columns up from the bottom. Account [112] 259.

ALVIN HUNT

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Williams:

Q. What is your name? A. Alvin Hunt.

Q. Where do you reside?

A. 1703-2nd Avenue North.

Q. In Great Falls?

(Testimony of Alvin Hunt.)

A. In Great Falls, yes, sir.

Q. How many years have you lived in Great Falls, Montana?

A. I have lived in Great Falls, Montana, since 1942.

Q. Where did you reside before that?

A. At Belt, Montana.

Q. For how many years?

A. From 1939 until 1942.

Q. What is your present occupation?

A. My present occupation up to date is still farm store manager for Gamble-Skogmo.

Q. Is that your official title?

A. That is my official title.

Q. And when did you become the farm store manager for Gamble-Skogmo, Inc.?

A. January 1, 1948. [113]

Q. Had you worked in the Gamble farm store prior to that time? A. Yes, I had.

Q. For how long?

A. In the spring of 1947.

Q. That was when you started?

A. When I first started for Gamble-Skogmo, yes.

Q. And how long have you been employed by the Gamble store in Great Falls, Montana?

A. Since I believe in September of 1946.

Q. ^{At} how many years have you been involved in the sale of farm machinery?

A. Since January 1, 1948.

Q. Prior to that what were the nature of your duties?

(Testimony of Alvin Hunt.)

A. I done service work on farm machinery after it went out to the customer and set it up and helped unload it from the cars and such work as that.

Q. Do you know when the farm store started operating in Great Falls, Montana?

A. Sometime in the early part of 1947.

Q. When you went to work for Gambles in the spring of 1947 what premises were being used for farm sales?

A. Well, the warehouse in the alley directly behind the department store was used for repair parts and the lot behind the store was also used for storing and for displaying of farm machinery.

Q. Just a minute. When you say the lot behind the store do you mean the lot which faces on First Avenue North? [114]

A. That is correct. The address would be about 520 First Avenue North, I suppose.

Q. What other property was being used for farm sales?

A. The other property used was a lot rented from the International people on First or Second Avenue South. I don't know exactly what the address would be. That lot was mostly used to set up and get the machines ready. It was unloaded there from the cars and set up for delivery to farmers, or to the lot on 520 First Avenue North.

Q. What premises have been used recently for the storage and display of farm store items?

A. For the last two years there has been used the property directly back of the store on 520 First

(Testimony of Alvin Hunt.)

Avenue North, using the warehouse and that lot, and also a large warehouse and lot at 23rd Street and 9th Avenue North, which was rented from Roy Anderson.

Q. Where are the parts to the farm implements stored and sold?

A. The parts were stored and sold from the building directly back of the store or lot that would be known as 520 First Avenue North.

Q. And where have the heavy implements under the farm store been displayed and sold?

A. They are displayed and sold in part back of the store on that lot, 520 First Avenue North, and also from the [115] warehouse and lot at Roy Anderson's at 23rd Street and 9th Avenue North.

Q. How far is the lot that you lease from Roy Anderson from the department store?

A. It is approximately two miles.

Q. Is Gamble-Skogmo, Inc., still in the business of selling farm store items?

A. Gamble-Skogmo, yes, are still selling farm machinery, but not in Great Falls.

Q. When was the farm store in Great Falls discontinued? A. About thirty days ago.

Q. So that, although you still have the title as farm store manager, you no longer have a farm store, is that correct? A. That is correct.

Q. Would you tell the court the manner in which a normal routine sale would take place of a farm store item?

A. Well, the normal routine sale, cash sale of

(Testimony of Alvin Hunt.)

a piece of machinery, generally the customer comes into the store and is interested in the type of machines and the price and so forth, and wants to see the machine, so he is taken out and shown the machine, shown how the machine is operated, and after the sale is made the sales slip is written up and the cash is received from the customer, and arrangements for the delivery of the machine is made. And after that machine has been delivered or after the sale has been completed, and if [116] I happened to have made the sale myself, I took the money sometime during the day and turned it in with a duplicate copy of the sales slip to the main office to be banked.

A. Now you understand that on the books there is a unit 5; is unit 5 the same as the farm store items?

A. Unit 5 is the farm store items, definitely.

Q. Has the farm store sold any items other than unit 5? A. No, they haven't.

Q. Have any items of unit 5 been sold elsewhere than in the farm store? A. No, they haven't.

Q. During the time that you have been acquainted with the farm store operations here in Great Falls, has any item of unit 5 been stored or displayed in the department store at 521, 523, 525 Central Avenue?

A. No, sir, there has never been any implements of any type stored or sold from that store.

Q. Briefly, what is the general nature of the items you sell in the farm store?

(Testimony of Alvin Hunt.)

A. Well, the items we sell in the farm store would be combines, tractors, plows, mowing machines and siderakes, and naturally those machines after they have been in the field have to be repaired, so there have to be repair parts stocked and sold to keep these machines in operation, and that is what unit 5 consists of.

Q. During the operation of the farm store when you were [117] in charge, where were your headquarters?

A. My headquarters were in the building on the alley on 520 First Avenue North.

Q. Did you have an office in that building?

A. I had an office in that building, yes.

Q. Did you do any book work in that building?

A. I done all my book work in that building.

Q. During the time you were manager, did you have occasion to have anybody working for you?

A. Yes.

Q. How many employees have you had working for you?

A. Well, the amount would vary, depending on the season. In the busiest season we had an average of about 5 or 6, and other times there would be one or two.

Q. Did you have any outside salesmen who were selling farm store items? A. Yes.

Q. To whom did they report?

A. They reported to me.

Q. Were you responsible for their actions?

A. Right.

(Testimony of Alvin Hunt.)

Q. Did they ever have occasion to report to the department store?

A. No, they didn't have any occasion to, because they were instructed to report to me.

Q. In the farm store did you have occasion to hire men to assemble the farm implements?

A. I had occasion to hire men to assemble the farm [118] implements, yes.

Q. Where was that work done?

A. At 23rd Street and Ninth Avenue North, at the Roy Anderson property.

Q. Under your supervision? A. Right.

Q. Did you have any occasion to have any mechanics repair farm implements? A. Yes.

Q. Where was that work done?

A. That was done at 9th Avenue and 23rd Street North.

Q. And if the implement had been sold and was on the farmer's premises, did the farm store still handle repairs on those? A. Yes.

Q. Was that under your supervision?

A. That was under my supervision.

Q. Who had the authority to hire and fire all these employees?

A. I had the authority at all times to hire and fire the employees.

Q. Did you have a telephone?

A. There was a telephone at 23rd Street and 9th Avenue North.

Q. Was that an extension of the phone of the department store?

(Testimony of Alvin Hunt.)

A. No, it wasn't an extension of the phone of the department store because, if it had been, you would have to make [119] calls through the store to get outside, and you could make calls long distance or any place from that phone.

Q. Under whose supervision were you?

A. I was under Mr. Cockayne's supervision.

Q. Did you have any other supervision?

A. Mr. Joe McNutt, District Manager.

Q. Where is his office? A. Billings.

Q. Did you have any other supervisors?

A. Mr. Phil Blicken of Denver.

Q. You stated that there has never been an item of unit 5 or a farm store item sold or displayed on the department store premises; would it be possible to display a farm implement there?

A. It would be possible, but you would run into such expense to get it in through the doors. The doors were too small and it would have to be torn down completely and reassembled in the department store, and the department store would not have floor space to warrant such a deal of displaying farm machinery inside the building.

Q. I believe you stated when you were describing the normal sale that the prospective purchaser would find you in the store, or some other salesman; were you referring to the department store?

A. I was referring to the farm store. I fell heir to a little sign up over this warehouse, "Gambles Farm Implements," [120] and that is what I considered a store when I am talking about a store.

(Testimony of Alvin Hunt.)

Q. Did you ever make the first contact with a prospective purchaser in the department store?

A. That was possible that I could have been in the store sometime during the lunch hour or eating my lunch or something to that effect, and a person probably contact me at that time, yes.

Q. Do you remember any occasion when you were in the department store on business and contacted a prospective purchaser?

A. Not anything, any definite deal, no.

Q. As I understand it, after you have demonstrated and the prospective purchaser has agreed to buy a farm implement and you are ready to complete the sale, that is done where?

A. Well, it just depends on where we were at. I have completed a good many sales in my own automobile. I have completed them in this warehouse on 520 First Avenue North, and I have completed them in the lot behind this building, and also the Roy Anderson warehouse at 23rd Street and 9th Avenue North.

Q. Now from the time the prospective purchaser is first contacted until the sale is completed, what part of the transaction takes place in the department store?

A. There is none. [121]

* * *

Q. Now you stated a minute ago that the merchandise was delivered to the customer; who made those deliveries?

A. Some of the outside men.

Q. Were they working for the farm store or department?

(Testimony of Alvin Hunt.)

A. They were working for the farm store.

Q. Do you know of anything any employee of the department store delivered a farm store item?

A. No, there never was any time when an employee of the department store delivered any items from the farm department.

Q. I understand now that the part of the bookkeeping for the farm store was done by the business office in the department store; is that correct?

A. That is correct to the extent of taking care of the sales and making an accounting of it. That part of the bookkeeping, that was all that was done in the office.

Q. Was the farm store charged for a share of the bookkeeping operation?

A. That is correct. [122]

Q. Was the farm store charged for any other items of expense on the department store?

A. No, I don't believe it was.

Q. You didn't pay any on lights of the department store? A. No.

Q. Or for any of their fixtures? A. No.

Q. Or for any of their rent? A. No.

Q. Now what basis were you paid upon?

A. Monthly salary.

Q. Did you receive or were you entitled to receive a commission or profit?

A. I was entitled to receive a commission if——

Q. If——

A. If the profits warranted it, yes.

(Testimony of Alvin Hunt.)

Q. Your profit was determined, was it not, after all the expenses were deducted?

A. That is correct.

Q. One of those expenses was rent, was it not?

A. That is right.

Q. During the time you were the manager of the farm store [123] you did pay rent for the premises which you have described as 520 First Avenue North and the Anderson warehouse?

A. That is right.

Q. And if the farm store had paid rent for any other premises, that would have decreased your chance of obtaining a commission? A. Yes.

Q. Is that right? A. That is very correct.

Mr. Williams: That is all.

AL HUNT

Cross-Examination

By Mr. Hall:

Q. Did you ever receive a commission?

A. No, I didn't.

Q. How much was the farm store charged for bookkeeping?

A. As to that figure exactly, I couldn't tell you.

Q. Well, you really know nothing about it, do you, Mr. Hunt?

A. Well, yes, to the extent as far as the office work was concerned in the department store I had nothing to do with that.

Q. You had nothing to do with the bookkeeping, did you?

(Testimony of Alvin Hunt.)

A. I had nothing to do with the bookkeeping of the department store, no. [124]

Q. Or of the farm store?

A. Yes, I had to a certain extent; not to the handling of the cash and rectifying the profits I did not.

Q. All you had to do as far as any form of bookkeeping was to keep stock records in the warehouse?

A. Stock records and making up orders.

Q. That wouldn't be bookkeeping, would it?

A. I don't know why it wouldn't be, you have to keep a record of it.

Q. By the way, what did you do with your orders after you made them out in the warehouse?

A. They were made out and put into an envelope and put into the mail box in the department store.

Q. Did you ever have them checked over by Mr. Cockayne?

A. Mr. Cockayne didn't check the orders.

Q. Never did?

A. No, didn't check the orders.

Q. Now was there anything stored out there in that warehouse besides farm implements?

A. Yes, there were other items stored out there.

Q. Quite a lot of furniture stored out there?

A. Yes.

Q. Tires? A. Tires.

Q. In other words, the department store was

(Testimony of Alvin Hunt.)

making use of that warehouse at all times, wasn't it? A. Yes, they were making use of it.

Q. That is true at the present time, isn't it? Are you [125] employed out there now?

A. No, I am not employed out there now.

Q. Where are you working?

A. I have been working part time in Havre and part time in the department store this last month, this last few weeks of the month.

Q. In the main store? A. Occasionally.

Q. And you are still working in the capacity as manager of the farm department?

A. Well, I couldn't be because I don't have any farm store.

Q. I misunderstood you; I thought you said you were still manager of the farm department?

A. I am still manager of the farm department but I don't have any farm store here at the present time.

Q. So you have been transferred to the main store?

A. I have been transferred to the main [126] store.

* * *

Q. Did you have anything to do with the getting up of the advertising for the farm department?

A. I helped with it, yes.

Q. And I assume you are familiar with that advertising over a period of three years?

A. Yes, I am familiar with it.

Q. And you will recall that in all cases the

(Testimony of Alvin Hunt.)

farm machinery or implements advertised were advertised at 521, 523, 525 Central Avenue?

Q. Well, I don't know. If the address was always on all [127] the items from what they were, yes.

Q. Whenever there was an address on, that was the address?

A. That was the address, that is right.

Q. And the only phone number given was 4384, which is the phone in the store at 521, 523, 525 Central Avenue, you know that, do you not, Mr. Hunt?

A. Yes.

Q. Are these farm trailers considered as farm implements?

A. Definitely.

Q. They are?

A. That is right.

Q. And how about hydraulic manure spreaders, are they farm implements?

A. They are farm implements also.

Q. And was there a downstairs store in the main building there at Gambles?

A. In which store, the department store?

Q. Yes, what they call the downstairs store, isn't it?

A. Yes.

Q. Were any of these farm implements ever displayed down there for sale?

A. No, sir.

Q. Do you recall any advertisements in the papers in which they were advertised for sale in the downstairs store?

A. What do you mean by that, where it had been down in the——

Q. What did you say?

(Testimony of Alvin Hunt.)

A. What do you mean by that? [128]

Q. An advertisement in the Great Falls Tribune advertising these items that I have just talked to you about for sale in the downstairs store?

A. No, sir.

Q. You say there never was any such advertising?

A. No, sir. [129]

* * *

Q. But all of the employees including yourself were paid out of the main store, were they not?

A. That is correct.

Q. Now in all cases all cash which was taken in by the farm department was taken to the business office, was it not?

A. That is right.

Q. That is, you didn't maintain any bank account for the farm department?

A. No.

Q. And you drew, as I understood Mr. Cockayne's testimony, a small amount of money for petty cash each day, which amount or what was left of it was returned after the close of the business day, was it not?

A. That is right.

Q. And you had no means during the lax part of each year of taking care of any cash in the small warehouse, did you?

A. That is right.

Q. And I think Mr. Cockayne said that during the very busy period there was a cash register kept there?

A. That is right.

Q. For two or three months, would that be about right?

A. That is about right.

Q. Otherwise money and the large checks es-

(Testimony of Alvin Hunt.)

pecially were [130] taken immediately, were they not, into the business office?

A. That is correct.

Q. Do you recall of any customers being sent from the main store across the alley to the small warehouse?

A. Oh, I have an idea that there were some; as to any specific deal or customer, I don't remember of any. I suppose there were some that were told where they would find me or where we done our farm business.

Q. That would be the natural assumption if the advertisements directed the customers to the main store, wouldn't it?

A. It would be, yes.

Q. Now when certain items were taken out to the country for delivery, how was that delivery made, Mr. Hunt?

A. Well, it depended on the type of machine. if it was a combine, it was driven out, or a tractor, driven out providing it wasn't too far; and other items which couldn't be driven out or too far to drive the other items, a truck would be hired, Great Falls Transfer or someone to take this out to the farmer.

Q. And who paid for the truck?

A. The expense came out of the farm store division and was paid out of the office.

Q. Paid out of the business office?

A. Paid out of the business office.

Q. And afterwards charged against the farm department? [131]

(Testimony of Alvin Hunt.)

A. Farm department. [132]

* * *

ROBERT F. PAPPIN

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Williams:

Q. What is your name?

A. Robert F. Pappin.

Q. Where do you reside, Mr. Pappin?

A. 2301 Seventh Avenue North in Great Falls.

Q. How long have you resided in Great Falls?

A. All my life with the exception when I was in the Army and in college.

Q. What is your present occupation?

A. General contractor.

Q. How long have you been working in the contracting business?

A. Well off and on ever since I was out of high school, [133] about fifteen years.

Q. Were you in the contracting business in 1946? A. Yes, sir.

Q. With what company were you connected in 1946? A. Floyd Pappin and Son.

Q. Are you then a son of Floyd Pappin and Son; that is, are you a member of that company?

A. Yes, sir.

Q. What is your official title?

A. I was the secretary-treasurer of the corporation.

(Testimony of Robert F. Pappin.)

Q. Was that in 1946? A. Yes, sir.

Q. At that time in 1946, what were the duties of your job?

A. I did the estimating and the contacting of the people that we were doing work for and lining up the work for the superintendents.

Q. In doing this estimating, was it necessary for you to inspect the premises on which you were going to do some work? A. Yes, sir.

Q. In the year of 1946, did your firm, Floyd Pappin and Son, have occasion to do any work on the premises known as Gambles store known as 521, 523, 525 Central Avenue?

A. The Gamble stores, yes, sir.

Q. And did you investigate the premises and make the preparations to line up that work?

A. Yes, sir.

Q. In investigating the premises, did you investigate [134] the basement floor?

A. Yes, sir.

Q. What was the condition of the basement floor in 1946 prior to the time that you started doing some work on it?

Mr. Hall: To which the defendant objects upon the grounds and reasons that it is immaterial and illustrates no issue in this case.

The Court: What is the purpose of it?

Mr. Williams: The purpose is we are interested in proving that the plaintiff has expended over \$20,000.00 in improving the premises in question approximately three years ago, and then suddenly

(Testimony of Robert F. Pappin.)

three years later their lease is, it is attempted to terminate their lease.

The Court: It might be an element that will enter into it. I will let you make the showing subject to your objection.

Mr. Hall: And may I have an objection to this line without constantly making objections?

The Court: It will be understood.

* * *

A. When we were called to go down to make the estimate on the work that we later did, we inspected the floor. In the north, excuse me, in the southeast corner of the building, [135] due to a gumbo and water condition this floor had heaved in some places as much as three inches.

Q. Were there cracks in this floor?

A. Yes.

Q. Was it in a condition it could be used as a store floor? A. No, sir.

Q. I understand that your company put in a sump pump on these premises in 1944?

A. That is my understanding; I wasn't here in 1944.

Q. And what did you do in connection with this basement floor in the Gamble store?

A. Well, we removed the existing floor, the floor that existed at that time and installed drain tile to the sump pump from the corner of the boiler room to the sump pump, and also from the northeast corner to the sump pump and each wall to the

(Testimony of Robert F. Pappin.)

sump pump draining the area so any further water that would get in there would be drained away.

Q. In other words, you put in practically an entire floor? A. All except the boiler room.

Q. What type floor was that?

A. Reinforced concrete.

Q. At the time you were doing this work, who hired you to do it? A. Gamble-Skogmo.

Q. And what representative of Gamble-Skogmo?

A. Mr. Bill Hill.

Q. Is that the same Bill Hill that sits on my left? [136] A. Yes.

Q. Will you tell the court very briefly, Mr. Pappin, what other work was done at the Gamble store by your company in 1946?

A. We removed a tile partition in the basement. We closed up an existing stairway and installed a new stairway according to their directions, and we rewired the basement for light outlets they designated removed and replaced the steam lines and roof drain lines which were in the basement to another location to gain head room, and built a balcony.

Q. By the gained head room you mean there wasn't sufficient head room in the basement prior to the time you——

A. The drain and steam pipes ran beside this tile wall and as long as the tile wall was in there the head room was sufficient, but when the tile wall was removed the pipes hung down below the beam. Then we built an extension to the balcony

(Testimony of Robert F. Pappin.)

on the main floor and installed some fixtures for the company, and built a balcony in what we call the farm store which is across the alley and re-decorated the entire store.

Q. Did you install a lunch counter?

A. Yes, sir.

Q. Shoe department?

A. We installed the shelving for the shoe department.

Q. Did you do any plastering?

A. Patching.

Q. What was the total bill for these services?

A. \$21,607.40. [137]

Q. And was that paid for by Gamble-Skogmo?

A. Yes. [138]

* * *

WILLIAM T. HILL

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Williams:

Q. What is your name?

A. William T. Hill.

Q. What is your residence?

A. Minneapolis, Minnesota.

Q. What is your age, Mr. Hill?

A. Forty-six.

Q. What is your present occupation?

A. Manager of the real estate department for

(Testimony of William T. Hill.)

Gamble-Skogmo, Inc., Minneapolis, [139] Minnesota.

Q. How long have you been manager of the real estate department?

A. Approximately 11 months.

Q. How long have you worked for Gamble-Skogmo, Inc.?

A. Five years.

Q. What did you do prior to the time you worked for Gamble-Skogmo, Inc.?

A. I was employed by a large midwest grocery chain in the same capacity for ten years.

Q. What were the nature of your duties and the work you did the 10 years prior to the time you started to work for Gamble-Skogmo, Inc.?

A. I was charged with the responsibility of managing the real estate department in a supervisory capacity and the construction of store lay-out, building design and purchase of fixtures.

Q. What are your duties at the present time?

A. My duties are confined to lease negotiations, the administrative work incurred in the real estate department such as renewals of existing leases, exploring new locations, handling all warehouse leases, any railroad sites which we have on lease.

Q. Have you been in the lease department ever since you were connected with Gamble-Skogmo, Inc.?

A. I have, yes, sir.

Q. How many premises does your department lease or how [140] many has your department a lease on at the present time?

(Testimony of William T. Hill.)

A. 352 retail store buildings and 5 warehouse operations in the eastern division.

Q. And you are in charge of the eastern division, are you? A. That is correct, yes, sir.

Q. Who is in charge of the eastern division of the lease department in December, 1943?

A. M. F. Hoben.

Q. Was he in charge from the time from 1943 until the time you took over? A. Yes, sir.

Q. Are you acquainted with the lease dated December 27th, 1943, which has been introduced in evidence as Plaintiff's Exhibit No. 1?

A. Yes, sir.

Q. Was that drawn up under the supervision of Mr. Hoben? A. Yes, sir.

Q. Is Mr. Hoben here today?

A. No, he is not.

Q. Was it possible for him to be here?

A. It wouldn't be possible for him to be here under any circumstances because of his physical condition. He has had both legs amputated.

Q. Do you know if McNair Realty Company has been advised that Mr. Hoben has had both legs amputated? A. Yes, they have.

Q. Does the lease department under your charge have the duties and responsibility of making the rental payments on your leases?

A. Yes, sir. [141]

Q. On all leases in your department?

A. On all leases in our department.

Q. Does your department have charge and re-

(Testimony of William T. Hill.)

sponsibility of making the rental payments on the lease involved in this lawsuit? A. Yes, sir.

Q. Does your lease department have other so-called percentage leases? A. Yes, sir.

Q. How many other percentage leases are there?

A. Approximately 120-125.

Q. In which Gamble-Skogmo, Inc., is the tenant and of which you have charge?

A. Approximately 125.

Q. When you say that there are approximately 125 percentage leases, what do you mean by percentage lease?

A. A percentage lease is based on net retail sales, fundamentally a guaranteed minimum with a percentage over and above a stipulated amount.

Q. Am I to understand you then that the plaintiff Gamble-Skogmo, Inc., has approximately 125 leases in which a percentage is paid on net retail sales? A. That is correct, yes, sir.

Q. Does your company have a uniform policy in determining the net retail sales?

A. Yes, sir.

Q. And how are the net retail sales determined?

A. The net retail sales are determined by the computation [142] of gross sales of each individual retail operation from which are deducted the repossessions, return of sales, discount sales to employees and wholesale sales.

Q. Are contracting sales also?

A. And contracting sales also, pardon me.

Q. What is the condition of transfer of mer-

(Testimony of William T. Hill.)

chandise to other stores, is that included in net retail sales?

A. Well, that is a bookkeeping program.

Q. Is that same system used to determine the net retail sales with all of these leases?

A. Yes, sir.

Q. Will you tell the court whether or not you have a policy and a uniform system in determining the actual rent figure and in making out the rental check?

A. Yes, sir, we do have. That initiates or originates through the sales and expense records supplied by that retail store. Those records are forwarded daily to a regional office situated in various parts of the Country. They in turn transmit those figures on a regular form for the purpose of establishing a record in the home office at Minneapolis as well as the retail store and the regional office. From that record our retail sales are established in the home office division for the purpose of computing the percentage lease, or by that I mean where the percentage lease exists. The accounting department computes those figures and supplies the real estate department with the final figures, at which time we prepare a [143] requisition for accrued rental check; that in turn is attached to a letter of transmittal and forwarded to each property owner or landlord where such a lease exists.

Q. Who signs the letter of transmittal?

A. I do, sir.

Q. As I understand it, you also at the present

(Testimony of William T. Hill.)

time make the check requisition or somebody in your department does, is that correct?

A. Yes, sir, that is correct.

Q. And that check requisition is based on figures furnished you by the accounting department?

A. That is correct, yes, sir.

Q. Was this same procedure followed in December of 1943? A. Yes, sir.

Q. I understand you did not come to work until sometime in 1944; how do you know the procedure was followed in 1943?

A. From the records I have available in each file.

Q. Is this procedure followed on all of your approximately other 125 stores with a percentage lease? A. Yes, sir.

Q. Has it been acceptable to your other landlords? A. Yes, sir.

Q. In the inception of your lease, was that procedure followed with McNair Realty Company?

A. Yes, sir.

Q. Is that procedure now followed with McNair Realty [144] Company? A. Yes, sir.

Q. Is that procedure now followed with McNair Realty Company?

A. No, it is not. At the present time the procedure is followed identically; however, this lease now requires a certified quarterly report by the month be furnished to the McNair Realty Company, and that in turn requires the signature of an officer or the comptroller or the company, but this is the

(Testimony of William T. Hill.)

exception and the only instance in which we have that situation.

Q. Then as I understand that you follow the same procedure with the addition that your accounting is certified by the comptroller, is that correct?

A. That is correct.

Q. Is that the only change?

A. That is the only change.

Q. In other words, the McNair Realty Company gets all the rest of the accounting plus this certification by the comptroller?

A. Yes, sir, that is correct.

Q. I believe you stated a few moments ago the lease now requires that this be certified by the comptroller, has there been a change in the terms of the lease?

A. Not by the lease instrument, only through correspondence with McNair Realty [145] Company.

Q. In other words, McNair Realty Company wrote a letter asking that it be certified?

Mr. Hall: Just a minute. We object to the evidence of contents of letters here.

The Court: Well, it is repetition of this situation of certification.

Q. Do your records, Mr. Hill, disclose when Gamble-Skogmo, Inc., started into the farm store business?

A. Our records, yes, the departmental records indicate we started in the farm store business late in 1946.

(Testimony of William T. Hill.)

Q. Is that throughout Gamble-Skogmo, Inc., or in Great Falls?

A. That applies throughout the Gamble-Skogmo operation.

Q. Approximately when did the farm, your records show that the farm store started in Great Falls, Montana?

A. About January 1st of 1947.

Q. Do your records show whether or not the Gamble-Skogmo, Inc., was in the farm store business in December, 1943? A. No, they do not.

Q. Was any Gamble-Skogmo, Inc., store throughout the United States in the farm store business in 1943? A. No, sir.

Q. In what year did you make your contract with Cockshutt Manufacturing Company to start manufacturing farm equipment and parts?

A. That was sometime in 1945.

Q. So insofar as the factor is concerned, you really [146] started in the farm business in 1945?

A. To the best of my knowledge, the franchise was executed in 1945 and the activity and realty for the installation and operation started in 1946.

Q. Since 1946 when the farm stores started, how many farm stores have been installed by Gamble-Skogmo, Inc.? A. Eighteen.

Q. Is Great Falls one of those eighteen?

A. Yes, sir.

Q. Does the plaintiff Gamble-Skogmo, Inc., have a policy as to whether or not farm stores should

(Testimony of William T. Hill.)

be set up as a branch or department store or as a separate store?

A. The policy of the company is to have them set up as a separate operation.

Q. Does the company have a policy whether these stores shall be on a percentage basis or a flat rental basis?

A. In all instances established agreements by contract or lease are on a flat rental basis.

Q. Are there any exceptions to this?

A. Yes, we have two exceptions which are situated, one in Montana, Havre, and one in Norfolk, Nebraska, and that developed because of previous commitments by lease before the inception of the farm machinery operation and because of the ability of our company to house the farm implement business in the building which we have previously committed ourselves to. They are operated in the same four walls as a retail store. [147]

Q. But you stated that these two are an exception to your general policy?

A. They are an exception.

Q. And the other fifteen or sixteen are in accord with that policy? A. That is correct.

Q. Does your company have a policy as to whether or not the bookkeeping of the farm store is done by the main store?

A. The bookkeeping is channeled through the main store offices.

Q. Does the company have a policy as to whether or not the management of and the manager of the

(Testimony of William T. Hill.)

main store will have partial supervision over the farm store manager?

A. At the present time the manager of the main store, retail store does have responsibility of some supervision over the farm machinery operation.

Q. Does your company have a policy as to whether or not the farm stores should pay any part of the rent of the main store?

A. No, they have a definite policy in respect to that. We do not pay any part of the rental.

Q. At the time when the farm store was started in Great Falls, Montana, which I believe you testified was early in 1947, was it possible to put the farm implements and establish the farm store in the premises which were already leased from McNair Realty Company under that lease [148] dated December 23, 1943?

A. No, sir, it would have not have been possible.

Q. Was it necessary to lease other property to install a farm store?

A. Yes, that is correct.

Q. What other property was leased?

A. Well, there was trackage leased from the C. M. St. P. & P. R. R. trackage site, International Harvester, Roy Anderson property, and the property belonging to the McNair Realty Company, located on approximately 520 First Avenue [149] North.

* * *

Q. On what basis was the rent paid on these other properties, on a percentage basis or a flat rental basis?

A. Flat rental basis.

(Testimony of William T. Hill.)

Q. Do you have a written lease on these other premises? A. No, sir, we do not have.

Q. Do you have an oral lease on these other premises?

A. There are no leases. The agreements are generally reached by the local management and the company policy requires that the stores in most instances make their own arrangements. The managers of the retail stores make their own arrangements on a month to month basis for such facilities.

Q. Do your records disclose what the total rent is which you have paid for the other properties leased under farm store operations?

A. Yes, sir.

Q. What is that figure? A. \$6,973.26.

Q. Do your records disclose what the total sales are of the farm store here in Great Falls, Montana?

A. Yes, sir.

Q. And what is that? A. \$259,320.40.

Q. As the manager of the rent department from the headquarters at Minneapolis, Minnesota, do you have access to the sales records of the Gamble store in Great Falls, Montana? A. Yes, sir.

Q. Are those sales records prepared in the normal course of business of Gamble-Skogmo, Inc.?

A. Yes, sir.

Q. Were the sales records in Great Falls, Montana, [150] prepared in the normal course of business of Gamble-Skogmo? A. Yes, sir.

Q. Can you tell the court what the per cent of the rent which has been paid on all the farm store

(Testimony of William T. Hill.)

property to date is to the total sales of farm store properties?

A. Yes, sir, 2.68% against total sales.

Q. If 2% were paid to McNair Realty Company upon the farm store sales, what would be the total rental percentage on farm store property in Great Falls, Montana? A. 4.68%.

Q. Does your company have a policy of maximum percentage rental? A. Yes, sir.

Q. What is the maximum rental which the company will pay on a percentage basis?

A. $2\frac{1}{2}\%$.

Q. Do you have any leases in which you pay more than $2\frac{1}{2}\%$? A. No, sir.

Q. Are you authorized to enter into any lease in which you pay a rental of more than $2\frac{1}{2}\%$?

A. No, sir.

Q. Has McNair Realty Company ever claimed a rental of 2% on the farm store sales?

A. Yes, sir.

Q. Has McNair Realty Company claimed that they are entitled to the possession of the premises involved in the lease dated December 27?

A. Yes, sir.

Q. What is the position of Gamble-Skogmo, Inc., as to that contention, and does Gamble-Skogmo, Inc., admit that the [151] defendant is entitled to possession of those premises? A. No, sir.

Q. Does Gamble-Skogmo, Inc., contend that the written lease dated December 27th is not terminated?

(Testimony of William T. Hill.)

A. Will you repeat that, please? Well, they contend that it was not terminated.

Q. By "they" do you mean Gamble-Skogmo?

A. Gamble-Skogmo, Inc.

Q. Do you understand that the defendant has given Gamble-Skogmo, Inc., a letter advising them that the rental on those premises will be at the rate of \$300.00 per day? A. Yes, sir.

Q. Has Gamble-Skogmo, Inc., ever agreed to that rental? A. No, sir.

Q. Are you acquainted with those premises in question? A. Yes, sir.

Q. Are you acquainted with rental conditions in Great Falls and throughout the Country?

A. Yes, sir.

Q. Would the rental of \$300.00 a day be a reasonable rental? A. It would not be.

Q. What would be a reasonable rental on those premises?

A. \$450.00 per month plus percentage basically 2%.

Q. When you say \$450.00 per month plus 2%, do you establish a minimum before the 2% started to apply?

A. The minimum at \$450.00 a month or \$5400.00 annually.

Q. And when would the percentage start to apply on a [152] reasonable rental?

A. Over and above \$270,000.00 volume net retail sales.

Q. Do your records disclose whether or not

(Testimony of William T. Hill.)

any repairs were made by the Gamble-Skogmo store in 1944?

A. Yes, we do have a record of expenditure in 1944 of certain minor alterations to the store front and entrance and the mezzanine balcony situated in the back of the building in the amount of \$3151.00, plus an additional \$218.00, as I recall.

Q. Do you have your records with you?

A. I have the records, yes, sir.

Q. What was the exact amount paid for repairs and improvements by Gamble-Skogmo, Inc., in 1944? A. \$3,368.07.

Q. As I understand you you stated at one time that as part of your job you have supervision of purchasing of fixtures and construction work, is that correct?

A. That was prior to my employment with Gamble-Skogmo, Inc.

Q. At the present time do you have such duties?

A. No, sir.

Q. When you were out here in—were you out here in 1946?

A. I was, yes, sir, on several occasions.

Q. Did you do any negotiating with Bob Pappin with regard to construction? A. Yes, sir.

Q. Was that in line with your duty? [153]

A. I was responsible for that work at that time. I handled the entire transaction and supervised the alterations and the repairs in connection with Pappin.

Q. Will you tell the court briefly what the con-

(Testimony of William T. Hill.)

dition of the premises was and in particular the basement floor prior to the time that work was done in 1946?

Mr. Hall: May I ask counsel a question, your Honor, upon this line of examination?

The Court: Yes.

Mr. Hall: Is it your theory, Mr. Williams, there was an obligation on the part of the lessor to do it?

Mr. Williams: No, that is not my theory.

Mr. Hall: In other words, the situation is, is it not, that this was done for the benefit of Gambles, the lease providing exactly what the lessor and the lessee were to do in connection with the remodeling work or repair work, and I can't see how it illustrates any issue in the case. That is the reason I am asking counsel these questions, your Honor. [154]

* * *

A. Well the basement area was not suited for retail merchandising and we originally thought that we could make certain repairs to the basement slab but upon examination and removal of certain portions of the slab we found there was hydrostatic pressure which caused the heaving of the floor and as a result we advised Pappin to remove 80% of the existing slab and replace it with required drain tile for the purpose of draining off any surplus water which would cause any further damage, and that in turn was drained into sumps and removed automatically by the pumps.

Q. Will you tell the court briefly what other repairs and improvements were put in in 1946?

(Testimony of William T. Hill.)

A. Yes. The wiring as a whole was completely replaced both in the basement and ground floor, the new customers' stairway installed to the basement area, the basement area 80% covered with asphalt tile, and there were other repairs made, removal of partial partition in the basement so that we had one complete span for sales area, and complete redecorating job throughout.

Q. What was the total amount expended on these improvements? A. \$26,342.46. [155]

Q. Now as I understand you this is amortized off during the life of the lease, is that correct?

A. That is correct.

Q. What is the balance that has not been amortized off as of November 30, 1949.

A. \$14,923.89.

Q. Where did you obtain that figure, Mr. Hill?

A. That is obtainable from two sources, both our store statement, which incidentally this figure was taken from, and the accounting department in Minneapolis, Gamble-Skogmo.

Q. If the lease were terminated, what would be the effect on the unused portion of these and not amortized portion of these repairs?

A. It would represent a total loss.

Q. What are some of the other effects upon the Gamble store in Great Falls, Montana, in the event of a sudden termination of their lease?

A. Well the expense involved for the removal of the merchandise, dismantling fixtures, shipment and reprocessing of all fixtures and merchandise,

(Testimony of William T. Hill.)

plus the loss of a capable and proven sales staff of people in excess of 40.

Q. Do your records show the amount expended on fixtures by Gamble-Skogmo, Inc., since 1944?

A. Yes, sir.

Q. What is that figure?

A. That amount is \$87,107.99.

Q. And how is that amortized or figured on your bookkeeping?

A. That is amortized over a period of ten years, the [156] fixture account.

Q. And by amortized over a period of ten years I assume that in merchandising you figure you use up a portion of it each year as each year's expense, is that correct?

A. That is correct.

Q. What do your records show as the balance which has not yet been amortized as of November 30th, 1949?

A. \$55,187.40.

Q. In the event of the termination of the lease suddenly what would happen to the furniture and fixtures?

A. Well it would be necessary to discard them entirely, crate them, reship them to our furniture factory in Fergus Falls, Minnesota. There might, however, be a few of them that would be reused in other stores as replacements throughout this region.

Q. Have you done any investigating to determine whether or not there is another available

(Testimony of William T. Hill.)

site for Gamble-Skogmo, Inc., to put in a department store in Great Falls, Montana?

A. Yes, sir, I have explored but there are none available at the present time.

Q. Approximately how long would it take you to outfit another Gamble-Skogmo department store and set it up in business?

A. Sixty to ninety days approximately.

Q. Are there any other effects on Gamble-Skogmo, Inc., of a sudden termination of their lease? [157]

A. Yes, its taken considerable time to build up a good will and enjoy volume in sales closely approaching profit.

Q. What would happen to the accounts receivable if the lease were suddenly terminated?

A. Well it would necessitate a representative of Gamble-Skogmo remaining in Great Falls for collection purposes.

Q. Whereas if the lease continues that can be handled by the normal operation of the business?

A. That is correct.

Q. You understand that McNair Realty Company has made a claim for back rent, is that correct? A. Yes, sir, that is true.

Q. Now, if this court or another court of competent jurisdiction decides that you owe, that Gamble-Skogmo, Inc., owes the defendant McNair Realty Company some back rent, is the plaintiff Gamble-Skogmo, Inc., ready, willing and able to

(Testimony of William T. Hill.)

make full compensation for that rent with interest, costs and damages?

A. Yes, sir, Gamble-Skogmo are ready and willing to compensate in the event the court decides.

Q. In full? A. In full.

Q. And that compensation would include rent, interest, costs and damages, would it?

A. Correct, yes, sir.

Q. Is this in any way an admission that the plaintiff Gamble-Skogmo, Inc., now owes the defendant any sum of money [158] for rental or damages? A. No, sir.

Mr. Williams: That is all.

Cross-Examination

By Mr. Hall:

Q. May I see your authority for making that statement, Mr. Hill, please?

A. My authority?

Q. Yes.

A. I can't show you anything in writing, Mr. Hall.

Q. Well who authorized you to make that statement? A. Gamble-Skogmo, Inc.

Q. And who in that corporation authorized you?

A. W. P. Berghuis, E. Pennock, W. J. Larson.

Q. Mr. Berghuis is general counsel of the corporation, is he not? A. That is correct.

Q. And who is Mr. Pennock?

A. He is one of the Vice Presidents.

(Testimony of William T. Hill.)

Q. And who is the other?

A. W. J. Larson.

Q. Yes.

A. He is also one of the Vice Presidents in charge of operations.

Q. But you have nothing in writing from the corporation in connection with that matter?

A. No, I do not.

Q. That is purely oral statements made by these officers to you?

A. Yes, sir, that is correct. [159]

Q. You are the manager of the real estate department as I understand it?

A. Yes, sir, that is right.

Q. And have been for a period of approximately eleven months? A. Yes.

Q. And as manager of that department you succeeded Mr. M. F. or Mike F. Hoben?

A. Yes.

Q. It was Mr. Hoben who negotiated on behalf of Gamble-Skogmo, Inc., the lease here involved?

A. Yes, sir.

Q. What are your duties and what is your authority as manager of the real estate department with respect to leases, Mr. Hill?

A. Well I am authorized to negotiate for leases on any new locations or renewals of existing locations subject to the approval of two or more officers of our company.

Q. And what two officers of the company do you now have to contact in order to get approval of your negotiations?

(Testimony of William T. Hill.)

A. W. J. Larson, E. Pennock and W. P. Berghuis.

Q. That is two out of the three?

A. Two of the three.

Q. I take it then where you have negotiated a lease that the matter is then taken up with either all three or two of the three officers and their approval either obtained or not obtained.

A. Yes, sir, that is correct.

Q. And do you have any other authority in connection with your duties as manager of the real estate department? [160]

A. Well my signature is accepted for payment of rental checks and I negotiate with railroads in respect to warehouse space and explore new locations in general.

Q. Do you have anything to do with the adjustment of complaints and controversies arising in connection with leases?

A. Yes, sir, subject to the officers' final approval.

Q. Well sometimes I take it you have authority that is prior authority to adjust differences arising out of leases and things of that character?

A. Providing it has been discussed and approved by the same group mentioned.

Q. Now as I understand it the real estate department of Gamble-Skogmo is charged with the duty of paying rents on all of the leases?

A. That is charged with the duty. The checks are not issued or signed by the real estate depart-

(Testimony of William T. Hill.)

ment but the records kept for payment of rentals is transferred to the department which makes out the checks.

Q. Do you keep records with reference to payment of percentage rentals, that is, the real estate department?

A. We keep the records in a cardex file which indicates the time each accrued rental check is due and payable to the landlord.

Q. But not as to the amount?

A. Not as to the amount. The amount is computed by the [161] accounting department.

Q. Yes. A. That is correct.

Q. And the check is transmitted, as I understand it, from the accounting department to the real estate department?

A. The figures by record are transmitted to the real estate department, who in turn accepts those as true figures, and we in turn issue a form which is a check requisition form that is signed by me and sent to the department which issues the checks.

Q. And then the check is retransmitted to the real estate department and sent out by the real estate department with a letter of transmittal, is that correct?

A. That is correct, yes, sir, on percentage leases.

Q. Well that is what I am talking about, percentage leases. A. Yes.

Q. Now are all your percentage leases based entirely upon net retail sales? A. Yes, sir.

Q. No mention made of wholesale sales at all?

(Testimony of William T. Hill.)

A. Only in this instance.

Q. This is the only instance?

A. The only instance.

Q. So that this lease does vary from other percentage leases in that respect, does it not?

A. Yes, sir.

Q. In calling for a percentage for the whole-sale sales? A. That is correct. [162]

Q. In addition to net retail sales?

A. Yes, sir.

Q. Now are your leases uniform with respect to the accounting periods?

A. No, they are not.

Q. You are familiar with the fact that the accounting period under the lease here involved is quarterly income? A. Yes, sir.

Q. Would that mean to you that an accounting is to be made of the wholesale and net retail sales for the prior quarter? A. Yes, sir.

Q. And if there is a rental payable on the basis of the lease that is a percentage rental that a check should accompany that account, is that correct?

A. That is correct.

Q. Well now what sort of an accounting should be made under a lease of this character which requires a quarterly accounting?

A. Well that originates from sales records and expenses in the retail store which it covers. That in turn is forwarded to Denver to the retail office daily. They transcribe that on a regular form which is provided showing all of the other inci-

(Testimony of William T. Hill.)

dentials, profits and otherwise, a copy of which is sent to the Minneapolis home office division of Gamble-Skogmo, Inc., upon which the accounting department computes quarterly, semi-annually or annual sales.

Q. And these daily accountings made by the store and then sent to Denver and by Denver to the office in Minneapolis [163] are these sheets here that Mr. Cockayne was testifying from, are they not? A. That is correct.

Q. And are available both to the Minneapolis office and Denver regional office daily?

A. Those sheets are not prepared daily. The sales records from the store as well as the expense items are forwarded to Denver. These are monthly statements, Mr. Hall.

Q. So that sometime right after the end of each quarter the Minneapolis office has a full and complete accounting of all sales made?

A. That is correct.

Q. Of wholesale or retail?

A. That is correct.

Q. In all of the departments of each individual store, that is the situation?

A. That is correct, yes, sir.

Q. Now what did Gamble-Skogmo mean by a quarterly accounting to be rendered to McNair Realty?

A. In each three months a transmittal would be forwarded to McNair Realty indicating the

(Testimony of William T. Hill.)

sales required or accomplished in that period of time.

Q. Would that be just a letter from the real estate department? A. Just a letter.

Q. Saying sales have been so much?

A. Yes, sir.

Q. And that would be your idea of an accounting? A. Yes, sir.

Q. No mention being made as I understand you how that figure was reached? [164]

A. Well it isn't the general practice, Mr. Hill.

Q. That is it isn't the general practice of Gamble-Skogmo you mean? A. That is correct.

Q. Well it is a fact, is it not, Mr. Hill, that McNair Realty Company complained from time to time with reference to the sketchy accountings that were being furnished to it? A. Yes, sir.

Q. By Gamble-Skogmo?

A. That is correct.

Q. And from time to time have various requests for additional figures so they could arrive at some conclusion, you recall that, do you not?

A. I recall that. I cannot recall all the correspondence that might have occurred prior to the time I was appointed manager of the real estate department.

Q. Well do you recall too, Mr. Hill, that these accountings were delayed for months and months at a time?

A. I can recall the instance of the correspond-

(Testimony of William T. Hill.)

ence which I had with the McNair Realty Company.

Q. I think you are now directing my attention to an incident that happened in 1948 when over a period of several months complaints were made by the McNair Realty Company, not only about the accountings furnished but about the amounts of the checks furnished, and it took quite a lengthy period of time before a final check for the true amount due under the percentage rental was finally reached, do you recall that? [165]

A. Definitely.

Q. And was that the instance you were talking about? A. That is correct.

Q. But you are not familiar with the situation in connection with these accountings in 1945, 1946 and 1947, is that the situation?

A. From the correspondence which I have read I am familiar up to a point which is available to me, Mr. Hall.

Q. As a result as I understand you of the complaints made by McNair Realty Company the Gamble-Skogmo has been furnishing for sometime a certified quarterly report?

A. Yes, sir, that is correct.

Q. And how long has that been true?

A. It has been true about one year.

Q. Now there were additional complaints made by the McNair Realty Company with reference to the accountings furnished and particularly with reference to the farm department sales, were there not? A. That is correct.

(Testimony of William T. Hill.)

Q. And when did those complaints commence if you now recall?

A. In 1948 to the best of my recollection.

Q. And about what time in 1948?

A. Oh, sometime in August or September, I believe.

Q. Do you have any of those letters with you from the McNair Realty Company in which the complaints in reference to the accounting of the farm department sales started? [166]

A. Yes, I do have.

Q. I have asked you to produce certain letters, some of which have to do with that matter? [167]

* * *

Q. Now you told me I believe, Mr. Hill, that sometime in 1948 there arose quite a controversy with reference to the accountings being furnished by Gamble-Skogmo to the McNair Realty for the percentage rental? A. Yes, sir.

Q. And the checks which were being received?

A. Yes, sir.

Q. And various letters passed, did they not, between McNair Realty Company and Gamble-Skogmo in connection with that matter?

A. Yes, sir.

Q. Look will you please, Mr. Hill, at letters which have been marked for identification purposes Defendant's proposed Exhibit 3 and Defendant's proposed Exhibit 4, and state whether or not those letters have reference to the complaints made by

(Testimony of William T. Hill.)

McNair Realty Company concerning the matter which you and I have been discussing?

A. This one, Mr. Hall. [168]

Q. Of September 29th, that is Defendant's Exhibit 3?

A. This one doesn't have reference to the incident or correspondence which——

Q. Exhibit 4 does not have reference to that particular controversy existing between McNair Realty Company with reference to making accountings and the checks being received, Exhibit 4 does not refer to that matter?

A. Yes, it does.

Mr. Hall: We offer in evidence Defendant's proposed Exhibits 3 and 4.

Q. By the way, Mr. Hill, both of those letters have been produced from your files, have they not, at my request? A. Yes.

Mr. Williams: We have no objection.

The Court: They may be received in evidence. What numbers are they?

Mr. Hall: Defendant's Exhibit 3, your Honor, and Defendant's Exhibit 4.

The Court: They may be received in evidence.

Mr. Hall: And deemed read?

The Court: And deemed read.

Whereupon said Defendant's Exhibit No. 3, offered and received in evidence is in words and figures, as follows, to wit:

(Testimony of William T. Hill.)

DEFENDANT'S EXHIBIT No. 3

B. P. McNair Company

Established 1893

Real Estate—Insurance

Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

Sept. 29th, 1948

Gamble-Skogmo, Inc.,

15 North 8th Street

Minneapolis, Minn.

Attention: Mr. Mike F. Hoben.

Dear Mike:

This will acknowledge receipt of your letter of September 27th with explanation as to why all farm sales are excluded from your sales' reports.

I think that further clarification may be necessary for the reason that we both know that a great proportion of these farm sales originate in the premises leased to you under percentage arrangement. We would like to discuss the matter with you further and personally and when you are next in Great Falls.

At any rate we are glad to have some sort of explanation from you as heretofore we have been getting nothing but a run-around.

Mike, it is not pleasant for us to play the role of chronic complainers. It would be considerably better for both of us if your Company would arrange to [170] take care of this Great Falls lease

(Testimony of William T. Hill.)

promptly and properly. To bore you with a little recent history: On July 6th you sent us a statement which should have been received in June, with a check for \$192.46. After due complaint by us on July 12th, you sent a revised statement of amount due of \$1729.32. After further complaint by us on August 3rd you sent us still a third check in the amount of \$309.76. After two further complaints we eventually received, as of August 30th, another "final" statement. This is still unsatisfactory and after writing your department on September 4th and again on September 20th, we are finally in receipt of your own letter of the 27th.

This still does not appear satisfactory for the reason that we think you owe us \$1387.97, covering farm sales, unreported, for the period March, April and May, 1948.

Page No. Two.

Gamble-Skogmo, Inc.

Sept. 29, 1948

Our past experience has not been too happy and that is all we have to go on.

May I also point out that we are not as yet in receipt of any statement covering the sales period June, July and August, 1948.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR.

(Testimony of William T. Hill.)

Whereupon said Defendant's Exhibit No. 4, offered and received in evidence, is in words and figures as follows, to wit:

DEFENDANT'S EXHIBIT No. 4

B. P. McNair Company

Established 1893

Real Estate—Insurance

Great Falls, Montana

November 9, 1948

C. S. McNair

B. P. McNair, Jr.

Mr. W. P. Berghuis, General Counsel,
Gamble-Skogmo, Inc.,
15 North 8th Street,
Minneapolis 3, Minn.

Dear Sir:

We are in receipt of your letter of November 5th in answer to our letter of October 28th addressed to Mr. P. W. Skogmo.

Needless to say, we regret exceedingly, for Mr. Hoben's sake, the unfortunate fact of his illnesses and operations. Probably these difficulties would never have arisen if he had been able to continue in his office and with his former good health.

The situation exists, however, and the fact remains that we have no adequate responses to our various inquiries.

As you are undertaking to clear the matter up

(Testimony of William T. Hill.)

we will ask you to be specific in regard to the following: [172]

Certified sales reports for the two quarters, March, April, May and June, July and August of this year, broken down by months and with these totals listed:

(a) Total gross sales.

(b) Inter-store sales or transfers of merchandise.

(c) Wholesale sales to employees or others.

(d) So-called "farm sales" and whether or not these "farm sales" figures are included in computation for rent purposes.

Note: We have never yet had true certifications of any of your sales, simply getting vague letters, quoting some figures in an off-hand fashion. We are entitled to, and would like to receive sworn certifications.

We have also noted from your letter that according to your computations on wholesale sales to employees, we have been overpaid. If this proves to be the case, after we are in receipt of your full sales data, duly authenticated, we stand ready immediately to make a proper refund.

Meanwhile, we wish again to call your attention to the fifth paragraph of our letter of September 29th.

(Testimony of William T. Hill.)

Page Number Two

Mr. W. P. Berghuis

Nov. 8th, 1948

addressed to Mr. Hoben and which deals with unreported "farm sales" for the quarter, March, April and May of [173] 1948. This point on "farm sales" has not been explained to our satisfaction and no such sales have been reported to us, either formally, or informally, by your office. We feel that we are entitled to a report on these sales and to 2% rent on the net total. This letter constitutes a demand on your company for such reports and for the additional rental due under such sales.

As this is the last letter we intend to write you in the matter, we would suggest that in answering you will kindly be more specific.

Yours very truly,

McNAIR REALTY COMPANY.

(Testimony of William T. Hill.)

Whereupon said Defendant's Exhibit No. 5, offered and received in evidence, is in words and figures as follows, to wit:

DEFENDANT'S EXHIBIT No. 5

C. S. McNair, W. Robt. Gilchrist, Manager, B. P. McNair. [175]

Established 1893

B. P. McNair Company

Insurance in all lines

Real Estate, Loans and Rentals

First National Bank Building

Phone 2-1094

Great Falls, Montana

May 28, 1946

Mr. Mike F. Hoben,
Real Estate Department,
Gamble-Skogmo, Inc.,
15 North Eighth Street,
Minneapolis 3, Minnesota.

Dear Mike:

The attached letters are self explanatory and this note is in no sense an apology.

From inception, our personal dealings with yourself and your company have been very pleasant, but from a business-wise standpoint, they have been far from satisfactory. Furthermore, as pointed out in our letter to Green, your sales have been highly disappointing. Something is seriously wrong with your store. Leslie's Ready-to-Wear on

(Testimony of William T. Hill.)

the corner, occupies one-sixth of the space that you do and has consistently paid us more rent than Gamble's.

With conditions as they now are, we would very much like to recapture your premises. Twenty-five feet in the same block has just been leased for ten years at a rental which figures \$900 per month including cash rent and tenant's improvements. You have seventy-five feet and we paid \$7,641.91 as our share of putting the premises in condition for you, at [176] the inception of the lease.

We still have faith, however, in Gamble's getting untracked and achieving a satisfactory operation in Great Falls. As I told you in 1944, we like to look at the long pull, but in this case something is radically wrong.

There is one other matter that should be attended to. My brother Ben had a distinct understanding with Mr. Hill at the time he superintended installation of the stairway to the basement and the removal of the tile basement partition, that a letter would be forthcoming from Gamble's to the effect that at the lease expiration these changes would be replaced at your expense if so desired by the landlord.

1

Mike, will you please be good enough not to let these matters drag, the warehouse lease, the corrected report on sales for both annual lease periods and this latest stairway and partition letter?

We are, frankly, very disappointed in our Gam-

(Testimony of William T. Hill.)

ble deal to date, but with personal regards to yourself and our other friends in the organization, we remain

Very truly yours,

B. P. McNAIR COMPANY,

By /s/ CHET,

C. S. McNAIR.

CSM:SHP [177]

Q. (By Mr. Hall) Now when was it that you first knew the fact that the McNair Realty Company claimed a percentage of 2% on farm sales? Made by the farm department?

A. Late in 1948 to the best of my recollection.

Q. As I recall the farm store started its operation some time in 1947? A. Early in 1947.

Q. Was the claim made by McNair Realty Company with reference to this percentage in writing or was that an oral claim?

A. In writing, Mr. Hall.

Q. And do you recall what time in 1948 that that suggestion was first made?

A. No, sir, I don't. The latter part of 1948.

Q. As I understood you the maximum rental which the Gamble-Skogmo Company has according to its policy is 2½%? A. 2½%.

Q. Are some of the percentage rentals of other stores based upon that percentage?

A. Yes, sir.

Q. Now the percentage rental is a rental over and above the minimum rental, is it not?

A. Yes, sir.

(Testimony of William T. Hill.)

Q. You understand——

A. Basically they tie together; the minimum rental is based on $2\frac{1}{2}$ in many instances, sometimes 2%.

Q. The lease here in question is based upon a minimum rental for a business of \$270,000.00?

A. Yes, sir. [178]

Q. That is \$5,400.00 per year? A. Yes.

Q. And then the percentage rental comes if the business done, the net retail sales are over and above \$270,000.00? A. Yes, sir.

Q. And that situation is true with reference to all of the leases, that is, the percentage leases which the Gamble-Skogmo Company has, is it not?

A. That is true with the exception of any of them that have a stipulation of a ceiling accrued rental or accrued rental I might state.

Q. That is you have a ceiling on the amount of percentage paid?

A. Yes, sir, that is correct.

Q. That isn't true in this particular lease?

A. No, sir.

Q. Did the controversy with reference to the payment of percentage of the farm store sales continue after 1948? A. Yes, sir.

Q. Continued down through 1949, did it not?

A. Yes, sir.

Q. And continued up until the time that the notice of termination was served upon Gamble-Skogmo? A. Yes, sir. [179]

(Testimony of William T. Hill.)

Redirect Examination

By Mr. Willams:

* * *

Q. Following that what took place?

A. Well I had several discussions with Mr. McNair in his office principally which continued through the week until Friday afternoon.

Q. Was there ever another discussion in which Cleve Hall and I were present?

A. Yes, sir, there were just four of us present that second meeting.

Q. And in the same discussion who else was present besides Cleve Hall and myself?

A. Mr. McNair and myself.

Q. At that time was there a second compromise offer made by Gamble-Skogmo, Inc.?

A. The second compromise offered.

Q. Yes, made by Gamble-Skogmo, Inc.?

A. Yes, at that time we agreed that.

Q. There was another compromise offer made?

A. That is correct.

Q. Who made that compromise offer?

A. You did. [181]

Q. And what were the terms of that offer?

A. Full 2% on net retail sales of farm machinery.

The Court: Just a moment. Let us understand. That 2% offer on farm machinery, sales of farm machinery was that with the understanding the old lease should be continued of December 27th, 1943?

(Testimony of William T. Hill.)

A. Yes, sir.

The Court: I see. Go ahead.

Q. Now you stated that 2% of farm sales would be paid, is that correct? A. That is correct.

Q. And what figure was that?

A. \$5,161.60.

Q. Was there any suggestion that if that figure was wrong, the correct figure would be paid?

A. That is correct.

Q. What was the offer in regard to future sales of farm store items?

A. We agreed to pay 2% for future sales as long as the farm machinery operation was in existence on Mr. McNair's property.

Q. Was there any offer made so far as sales reports were concerned?

A. Yes, we agreed to furnish certified monthly reports on net retail sales.

Q. And was that offer accepted?

A. No, sir. [182]

* * *

Recross-Examination

By Mr. Hall:

Q. Do I understand now there never was agreement reached with reference to the payment of \$5,161.60?

A. That was to become a part of a new situation or we [183] tentatively agreed prior to that before we entered into negotiations for a new lease, \$5,100.00. As a matter of fact that was in your office.

(Testimony of William T. Hill.)

Q. That figure was agreed upon, was it not?

A. Yes.

The Court: I don't understand that situation. He said that wasn't agreed; it was categorically refused.

Mr. Hall: May it please the court, I can see where the court is confused. The offer that was categorically refused by Mr. McNair was the offer of one-half of \$5,161.60.

The Court: I see.

Mr. Hall: The figure \$5,161.60 had been arrived at by the use of these store records. I understand Mr. Williams used them in reaching that figure and that was accepted by the defendant as representing 2% of the farm sales.

The Court: And continue the old lease.

Mr. Hall: That was the proposition. The first proposal was one-half of \$5,161.60 and continue the old lease.

The Court: Well, now, then he offered the full amount, \$5,161.60?

Mr. Hall: That is what I understand.

The Court: And that was accepted by Mr. McNair?

Mr. Hall: That figure was accepted as we understand it.

The Court: Now what do you say about [184] that?

Mr. Williams: No, sir, that one, that was not accepted.

The Court: Did you offer one-half first?

(Testimony of William T. Hill.)

Mr. Williams: Yes, sir.

The Court: And continue the lease?

Mr. Williams: And continue the lease.

The Court: And then did you later offer the whole amount, \$5,161.60, whatever it is, and continue the lease?

Mr. Williams: Yes, sir.

The Court: And you say he categorically refused that?

A. Yes, sir.

The Court: All right, then I understand you.

Q. (By Mr. Hall): Now when was this second conversation in my office, Mr. Hill?

A. The second conversation?

Q. Yes.

A. The first meeting was the 25th; that would be the following morning.

Q. The following morning?

A. It seems to me it was.

Q. Well had you had any discussion with Mr. McNair after you left my office on October 25th with reference to either the payment of the 2% on the farm sales or a new lease?

A. Yes, I had. [185]

Q. Where did you have that conversation on the afternoon of October 25th?

A. Maybe that was in Mr. McNair's office, as I recall.

Q. Was that before or after you received this telegram? A. That was after.

(Testimony of William T. Hill.)

Q. And then after that discussion you came back up to my office the next morning, is that right?

A. As I recall we did, Mr. Hall.

Q. And there was a further discussion with reference to the payment of this \$5,161.60?

A. Yes, sir.

Q. Was there an agreement reached at that time with reference to that amount? A. No, sir.

Q. There was not. You then entered upon a discussion of a new lease, is that the situation?

A. With Mr. McNair.

Q. That is what I—— A. Correct.

Q. As I understood you that discussion took place in my presence and in the presence of Mr. Williams in my office?

A. Only the \$5,161.00 but no discussion about new lease in your office except we all agreed Mr. McNair and I might possibly get together on another situation which would be satisfactory to both he and our company.

Q. On a new lease?

A. That is correct. [186]

Q. But you say now that you never did reach an agreement with reference to the payment of the \$5,161.60?

A. That was refused by Mr. McNair.

Q. Refused entirely?

A. Only in the event we could execute a new lease which would be acceptable to our Company with the \$5,161.00 being accepted by Mr. McNair.

(Testimony of William T. Hill.)

Q. Whereupon you started discussions with reference to a new lease? A. That is right.

Q. With the term to start on October 1st, 1949?

A. Well that was the time to commence which Mr. McNair requested, and from there what we talked about was a ten-year lease, no particular starting date except that particular date Mr. McNair brought out.

Q. Was that satisfactory to you?

A. I wasn't concerned about the starting date at that time.

Q. Now you said you were in Mr. William's office when he called me with reference to a compromise negotiation in my office?

A. That is correct.

Q. And did you hear him use those words, "compromise negotiation"?

A. I don't recall, Mr. Hall.

Q. Our discussion, that is, the discussion between myself and Mr. Williams was mostly with reference to your authority, was it not?

A. Principally, that is correct. [187]

Q. And it was during that conversation that he said: "Well, we have a checkbook." Do you recall that?

A. Not as I recall, I didn't hear the conversation on both ends of the phone, Mr. Hall. As I recall the statement came from you.

Q. Did you hear my conversation?

A. No, I did not.

Q. Well, didn't Mr. Williams tell me that, "We

(Testimony of William T. Hill.)

have the right to write a check for this farm rentals''? A. For a settlement.

Q. Well, he didn't give me any figures at all but he said you had authority to write a check, did he not? A. That is correct.

Q. And did you hear that I said to him, "Well, that is pretty good authority if you have the right to write a check''?

A. That was repeated. That I didn't hear it.

Q. Well, he repeated that to you?

A. That is correct.

Q. And when you came over to my office you had a checkbook with you, did you not?

A. Mr. Cockayne had it in his possession.

Mr. Hall: I think that is all.

Mr. Williams: I would like to ask one or two questions to see if we can clear this matter up. [188]

Re-redirect Examination

By Mr. Williams:

Q. At any time during this entire series of negotiations with McNair Realty Company did you ever make an offer to pay \$5,161.60 in the event McNair Realty Company insisted on termination of a lease dated December 27th, 1943?

A. No, sir.

Q. Each time that offer was made then it was with the understanding that the old lease would continue in effect? A. That is correct.

Mr. Williams: Plaintiff rests, your Honor.

The Court: Very well, Mr. Hall. [189]

Mr. Hall: I have about eight advertisements, may it please the court, to put in evidence, and if counsel will come over and look at them, then we will cut them out of the paper and have them marked.

Mr. Hall: We offer in evidence Defendant's proposed Exhibit 8.

Mr. Williams: We have no objection.

The Court: It may be received in evidence.

Mr. Hall: The court reporter can make copies of these, your Honor.

The Court: Very well.

Mr. Hall: We offer in evidence Defendant's proposed Exhibit 9.

Mr. Williams: No objection.

The Court: Received in evidence.

Mr. Hall: We offer in evidence proposed Exhibit 10 for the defendant.

Mr. Johnson: No objection.

The Court: It may be received.

Mr. Hall: We offer in evidence proposed Exhibit 11 for the defendant.

Mr. Johnson: No objection.

The Court: It may be received.

Mr. Hall: And I have selected about three advertisements for each year rather than try to put in any more. [190] We offer in evidence proposed Exhibit 12 for the defendant.

Mr. Johnson: No objection.

The Court: It may be received in evidence.

Mr. Hall: We offer in evidence proposed Exhibit 13 for the defendant.

Mr. Johnson: No objection.

The Court: It may be received in evidence.

Mr. Hall: We offer in evidence proposed Exhibit 14 for the defendant.

Mr. Johnson: No objection.

The Court: It may be received in evidence.

Mr. Hall: We offer in evidence defendant's proposed Exhibit 15.

Mr. Johnson: No objection.

The Court: It may be received.

(Whereupon said Defendant's Exhibits Nos. 8 to 15, inclusive, offered and received in evidence, are a part of this record.) [191]

Mr. Hall: Call Mr. William Roberts.

WILLIAM B. ROBERTS

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hall:

Q. State your name, please.

A. William B. Roberts.

Q. Where do you live?

A. 112-19th St. North, Great Falls, Montana.

Q. And what is your business?

A. I am employed by the B. P. McNair Company, agents for the McNair Realty Company.

Q. How long have you been so employed?

(Testimony of William B. Roberts.)

A. Since May, 1949.

Q. At my request have you made a check with reference to telephone number 6484?

A. I have.

Q. And what did you find?

A. I found through telephone books for 1938, 1947 and 1946 and back that there was no such number listed for Gamble farm store or anyone else connected with that type of business. The number belongs to a woman in Black Eagle who has had it since 1942.

Q. Did you make a search for any number for a Gambles store or warehouse located at 23rd Street on 9th Avenue North? [192]

A. I did.

Q. Did you find any number?

A. I found nothing, neither to Gamble store or to agricultural implements.

Mr. Hall: You may cross-examine.

Cross-Examination

By Mr. Williams:

Q. In your research, Mr. Roberts, did you go to the telephone company?

A. I did.

Q. Was there any number listed there under the name of Alvin Hunt?

A. I did not look for Alvin Hunt.

Q. Did you check the unlisted numbers in the telephone company?

A. They will not give you those.

Q. Then as far as your research is concerned it

(Testimony of William B. Roberts.)

is possible that there was an unlisted number for the Gamble farm store, is that correct?

A. There could have been.

Mr. Williams: That is all.

Mr. Hall: That is all.

CHESTER McNAIR

was called as a witness, and having been first duly sworn, testified as follows: [193]

Direct Examination

By Mr. Hall:

Q. State your name, please.

A. Chester McNair.

Q. Where do you live, Mr. McNair?

A. Just outside of city limits of Great Falls to the south.

Q. You have lived here all your life, have you not?

A. Yes.

Q. What is your business?

A. Real estate and insurance.

Q. And are you connected in any way with the McNair Realty Company?

A. Yes.

Q. And in what capacity?

A. Stockholder, director and officer.

Q. And what officer?

A. President.

Q. And McNair Realty Company is a corporation, is it not?

A. It is a corporation.

Q. And how long have you been a stockholder, director and officer of that company?

A. Since it was incorporated in 1934.

(Testimony of Chester McNair.)

Q. You were also connected with the B. P. McNair Company, were you not? A. Yes, sir.

Q. I understand that to be a partnership?

A. That is a partnership.

Q. And are you one of the partners?

A. I am.

Q. The B. P. McNair Company was founded by your father, [194] B. P. McNair?

A. Originally.

Q. And has been in existence how long?

A. Since '93.

Q. Here in Great Falls?

A. Here in Great Falls.

Q. And during that entire time has the B. P. McNair Company and partners, that is, the two partners and the McNair Realty Company been in the real estate business here in Great Falls and in the surrounding country? A. Yes.

Q. How old are you, Mr. McNair?

A. Fifty-one.

Q. And how long have you been in the real estate business here in Great Falls?

A. Thirty years.

Q. The McNair Realty Company is the owner of a building located on the West half of Lot 8 and on Lot 9, Block 316 of original townsite of Great Falls, is it not? A. Yes.

Q. And in that building at the present time you have tenants? A. Yes.

Q. When I say "you," I mean McNair Realty?

A. That is right.

(Testimony of Chester McNair.)

Q. Who are the tenants?

A. Well, the portion of land description you give is occupied—the building covers more ground than that, but that portion is occupied by Gamble-Skogmo, Inc.

Q. That is what we call here in Great Falls as the Gamble Store? A. Yes. [195]

* * *

Q. When did you first become acquainted with Gamble-Skogmo, Inc.?

A. With their representatives, purported representatives in the summer of 1943.

Q. And what was the occasion of your meeting them at that time?

A. One of their men came to our office to see whether or not they could rent a portion of this building you have been talking about for a Gamble store.

Q. By the way, was the portion now occupied by Gamble-Skogmo then leased to anyone else?

A. It was. The part of it was under lease to Safeway Food Stores; I forget their corporate title.

Q. That is the grocery chain? A. Yes.

Q. Had the other part been leased?

A. The other part had been occupied and was just vacated by the New York Store, a furniture concern.

Q. I understand then that in the part of the building now occupied by Gamble-Skogmo there were two separate stores?

(Testimony of Chester McNair.)

A. Two separate stores.

Q. And did Gamble-Skogmo have a store here in Great Falls at the time the representatives came to see you? [196]

A. Yes, but not under that name.

Q. Under what name were they then operating?

A. They occupied a store further out on Central Avenue, a small store which was I believe known as Western Auto Supply.

Q. That was immediately adjoining the store owned by Victor Ario, was it not? A. Yes.

Q. And do you remember who the representative was that came to see you?

A. The first representative was a man by the name of Phil Chandler.

Q. And was he an officer of the corporation?

A. I doubt that. He was a merchandising man and told us that it was a little out of his department but that he wanted to learn whether or not the store premises could be had, and that he would have his real estate department if they were further interested, get in touch with us.

Q. And who was the next representative that got in touch with you? A. Mike F. Hoben.

Q. And he has been identified here as the predecessor manager of the real estate department of Gamble-Skogmo? A. That is right.

Q. Predecessor to Mr. William T. Hill?

A. That is right. [197]

Q. And did you enter into negotiations with him with respect to leasing the portion of the building?

(Testimony of Chester McNair.)

A. Yes, he came to Great Falls for that purpose.

Q. And did those negotiations ripen into the present lease, that is, the lease here under consideration dated December 27th, 1943?

A. Yes, they did.

Q. Now is this the first percentage lease that you have entered into here in Great Falls covering mercantile establishments? A. No.

Q. For how long a period of time have you negotiated and executed these percentage leases?

A. Somewhere close to 25 years.

Q. How many do you have in effect at the present time?

A. Well, through our office. Now you say me, do you mean McNair Realty?

Q. Either McNair Realty Company or leases handled by McNair Realty Company for clients?

A. Well, for the account of others, McNair Realty Company, we have eleven leases in effect at this time, in addition to the one that is under consideration here.

Q. What is the purpose of a percentage lease; why are they negotiated?

A. Well a percentage lease serves a peculiar purpose. In this wise it effects more nearly equitable partnership so to speak between landlord and tenant in this fashion, that [198] both participate in good business and to a degree both participate in poorer business. It is usually put into effect with a minimum guarantee which is designed to take

(Testimony of Chester McNair.)

care of certain fixed expenses, taxes, insurance and depreciation, repairs if you like, and thereafter there is a participation as between landlord and tenant with the ups and downs of fortunes in the business over an extended period of time. For instance, a landlord or tenant might be reluctant to tying himself over a ten-year period to a fixed flat rental. The landlord might be reluctant for the reason if the value of the premises went up he wouldn't be able to participate. The tenant would be reluctant because if the value goes down, he would still be tied to a higher flat rental, and so to iron out and make participation an equitable arrangement percentage leases are used and that gives stability over length of term to both.

Q. It is a compromise arrangement to take care of the goods years and bad years?

A. That is true.

Q. From the standpoint of the landlord as well as the tenant?

A. That is right.

Q. And have the percentage leases generally speaking so far as your experience been operated successfully here in Great Falls?

A. I would say they are very successful in Great Falls.

Q. And did you go into all those matters with Mr. Hoben [199] during the negotiations you had with him in connection with this particular lease?

A. Yes, to some extent.

Q. And did you have any discussion with him with reference to how the percentage rentals were

(Testimony of Chester McNair.)

to be paid, that is, upon what basis they were to be made?

A. Oh, yes, it was agreed between us that they were to be, that sales were—that total sales were to be reported covering each quarterly period.

Q. And by total sales you mean all retail and wholesale sales made? A. All sales.

Mr. Williams: If the court please, we object to this line of testimony as varying and being in violation of the parol evidence rule. I believe it is an attempt here to vary the terms of the written lease. So far as an accounting is concerned the lease speaks for itself and it is in evidence.

Mr. Hall: We are not asking for an accounting.

Mr. Williams: No, but you are asking for the arrangements which were made and which were ultimately incorporated in the lease.

Mr. Hall: No. You are asking for an interpretation of an ambiguous clause; that is what I am going after.

The Court: Well, proceed and we will see.

Q. (By Mr. Hall): I believe you said the basis or payment of the [200] rentals was to be based upon all sales, was that the situation?

A. No accounting was to be made of all sales. The basis of the percentage, the payment in excess rental payment was to be based on certain of the total sales.

Q. And what sales was the percentage rental to be based upon?

(Testimony of Chester McNair.)

A. On retail, net retail sales and on net whole-sale sales.

Q. And was there any discussion as to what net retail sales meant?

A. Yes, to this extent, it meant all sales to employees was taken up and it was mutually agreed those should be excluded. The matter of—you are confining this to retail sales?

Q. Yes. A. I believe that was all.

Q. What was there understood with reference to wholesale sales?

Mr. Williams: I object again, your Honor, on the ground that comes out there is violation of the parol evidence rule, and the lease very definitely provides what the terms of the lease are insofar as wholesale sales are concerned.

The Court: Yes, I think you are going beyond it all right. Sustain the objection.

Q. (By Mr. Hall): Well as a result of these negotiations and talks, as I understand it, the lease which is in evidence as Plaintiff's [201] Exhibit No. 1 was entered into between Gamble-Skogmo, Inc., and McNair Realty Company, is that the situation? A. That is right.

Q. Now did the Gamble-Skogmo, Inc., make the quarterly accountings to the McNair Realty Company? A. Occasionally.

Q. Well, what have you to say with reference to the first year of the lease?

A. No accounting was made until the lease year was fully concluded.

(Testimony of Chester McNair.)

Q. And what sort of accounting was made after the expiration of the first year?

A. We received a communication to the effect that the sales had not approached the point where there was any excess rental beyond the required minimum earning.

Q. Did you receive any accounting until you had made several requests for it? A. No.

Q. Or any record of that character?

A. No.

Q. And what have you to say with reference to the accountings for the second year of the lease?

A. I can't recall year by year without going to the files because one year varies with another but generally speaking we always had to write for accountings.

Q. And would the accountings be made promptly at the end of each quarter or what was the situation? [202]

A. No, they would drag anywhereas from six weeks to six months from the conclusion of any given quarter.

Q. And what sort of accountings were made generally speaking to McNair Realty Company of retail sales, total sales and wholesale sales?

A. None whatever as to that, as to any wholesale sales; some figures were given as to purporting to be net retail sales.

Q. And would that be in the form of letters or form of an accounting?

A. It would be in the form of a letter.

(Testimony of Chester McNair.)

Q. And was that situation true generally speaking until sometime let us say in 1948?

A. It was true at all times.

Q. Did the McNair Realty Company make complaints from time to time with reference to the so-called accounts or accountings that were being furnished to them?

A. A good many of them.

Q. And as a result did the method of accounting or furnishing these accountings become changed by the Gamble-Skogmo Company?

A. Yes, we had accountings, purported accountings made over so many different signatures and changed and corrected when we would call attention to them and then another accounting over an entirely different signature, that we finally [203] asked if this company would furnish us certified accountings signed by a responsible officer of the company.

Q. Well, was there a period which brought that matter to a head?

A. Yes, there was a particular period.

Q. And do you remember when that period was?

A. Yes, that was in the summer of 1948.

Q. And what was the experience of the McNair Realty Company at that time with reference to the furnishing of accountings as required by the lease and the payment of rental as required by the lease?

A. We—may I refer to some notes as to dates and etc.?

The Court: Yes, notes made by yourself.

A. Notes made by myself. We received a report in July of 1948. I don't know the date we received

(Testimony of Chester McNair.)

it. It was dated July 6th, reporting net retail sales of \$77,000.00.

Mr. Williams: Your Honor, I object to this line, this testimony. He is testifying as to an account. I do not know whether he has access to the account, and it is merely secondary evidence if the account is available.

Mr. Hall: May it please the court, upon counsel's demand I have turned these papers over to him; he has them all and if he will turn them back to me, I will give them to Mr. McNair.

The Court: All right, if you have got the property, [204] give it up.

Mr. Williams: I have it right here.

Q. (By Mr. Hall): What was the date, Mr. McNair? A. July 6th, 1948.

Mr. Williams: If the court please, there is going to be the line of testimony that is now directed as to the account which McNair Realty Company has received, and our objections to it, that is going to take a file covering correspondence from 1944 to the present time. I would be glad to stipulate with counsel for the defendant that all of those accounts may be introduced into evidence, and all letters written by both parties concerning the accounting and that that correspondence file may be introduced in evidence as one exhibit.

The Court: That would save a lot of time all right. What about that, Mr. Hall?

Mr. Hall: Very well, I will just put all these in evidence. Just have them marked.

The Court: You might just as well do that because by the time I get to consider it, I will have forgotten it. If you give it to me now and I will have to look at it if it is all compiled as exhibits.

Mr. Hall: Can we take a little time out now to have these marked? [205]

The Court: Yes, we will take fifteen minutes or what time needed and the Clerk can call me (3:15 p. m.)

(Court resumed, pursuant to recess, at 3:50 o'clock p.m., at which time the parties and all counsel were present.)

The Court: Do I understand this has to do with the original lease? What is the correspondence mainly about?

Mr. Hall: This bundle of correspondence, may it please the court, relates to the accountings made by the plaintiff Gamble-Skogmo, Inc., to McNair Realty Company in chronological order during the period from December 27th, 1943, to October of 1949, with the objections made from time to time by the McNair Realty Company or its agent, the B. P. McNair Company, with reference to the accountings, demands for accountings, and criticisms of accountings, and also complaints made with reference to the delay in making remittances and then questioning the amounts of remittances or having to do with the payment of percentage rentals under the lease of December 27th, 1943, and all of that correspondence has been given Exhibit No. 16 for defendant.

The Court: That contains the letters and answers.

Mr. Hall: With respect to the accountings and rental made. It is as I understand it as near as we can come to a complete file of original correspondence. [206]

The Court: Very well.

Mr. Hall: I now offer it in evidence.

Mr. Williams: If the court please, what is the corresponding date on that correspondence? What is the date of the last letter of that correspondence?

Mr. Hall: October 4th, 1949.

Mr. Williams: We will stipulate that that is a complete file of accounting and the defendant objects to the accounting and the plaintiff's answer to those objections from December 27, 1944, to October 4th, 1949.

The Court: Very well.

Mr. Hall: There has been no accounting made since October 4th, 1949.

The Court: It may be received in evidence and will be considered later by the court.

(Whereupon said Defendant's Exhibit No. 16, consisting of correspondence between the parties, offered and received in evidence, is in words and figures as follows, to wit:) [207]

DEFENDANT'S EXHIBIT No. 16

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager

B. P. McNair Company

First National Bank Building

Great Falls, Montana.

November 15, 1944.

Mr. M. F. Hoben,
Gamble-Skogmo, Inc.,
700 Washington Avenue North,
Minneapolis, Minnesota.

Dear Mr. Hoben:

According to our lease with you on your Great Falls store, we are to recieve from you a quartly accounting together with check for excess sales. At the present time you have been operating here approximately six months and to date we have received no accounting or check. Undoubtedly this has been overlooked by your firm so would you please be good enough to send the first quarterly accounting together with check if any. Also make a notation so that in the future we will recieve a quarterly accounting.

Chester has been laid-up with sinus trouble, the flu and has had his upper teeth removed so he has had a rather bad time lately.

Defendant's Exhibit No. 16—(Continued)

With best regards to all of you in which Chester joins, we are

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ B. P. McNAIR.

ew/ [208]

November 28, 1944.

M. F. Hoben,

B. P. McNair Company,

1st Natl. Bank Bldg.,

Great Falls, Montana.

Dear Mr. McNair:

Your letter of November 15th came while I was away from the office, and I am pleased to prepare and forward to you the report which you ask for.

Net retail sales for the quarter beginning March 1 and ending May 31 amounted to the small amount of \$11,394.29. This is because during most all of this period, we were still occupying the small Western Auto Store.

For the second quarter beginning June 1 and ending August 31, sales amounted to \$80,306.00. Thus total retail sales for the six months period amounted to \$91,700.29. Sales required to have paid additional rental would have had to exceed \$135,000.00 for the six months period, as it is based on total sales of \$270,000.00 per lease year.

With the ending of business on November 30th,

Defendant's Exhibit No. 16—(Continued)

we will have the additional report for the third quarter which we will forward to you promptly.

Sales at the present time are running along on a satisfactory margin, and I am satisfied that the total sales for the lease year ending March 1st will be well into the bracket that will pay you additional rental. It appears that the first twelve month period will be handicapped because of [209] the long time it took to prepare the building, etc.

I was very sorry to learn of Chet's being laid up. Hope before this, he is fully recovered and his good self again. I had planned on visiting Great Falls this fall, but have been unable to due so.

I also hope that with the prospects of returning merchandise such as household appliances, radios, etc., that our sales will be of such a volume that our additional rental checks to you will be entirely satisfactory.

Kind personal regards and best wishes.

Sincerely yours,

GAMBLE-SKOGMO, INC.,
Real Estate Department.

MFHoben:bg [210]

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Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo Inc.
Operating Gamble Stores
700 Washington Ave. North
Minneapolis, Minn.

In Reply Please Refer to:

M. F. Hoben.

December 22, 1944.

B. P. McNair Company,
First Nat'l. Bank Bldg.,
Great Falls, Montana.

Attention: Chet McNair.

Dear Chet:

It is difficult to make a promise of a definite date that either Ken or myself can visit Great Falls in the very near future. There are so many plans being developed in various sections of the country, many of them in the works, that it seems hopeless to think of a trip to Great Falls for very soon.

We appreciate your invitation, and nothing would please either or both of us better than to spend a couple of days with you.

This inquiry I made of you about the corner store is from Ken and myself because we are very sold on Great Fall and the tremendous possibilities that present themselves for our company. We can see results possibly far exceeding the things that you and I talked about. We want to be in a position to take advantage of them and share the results with you folks.

Defendant's Exhibit No. 16—(Continued)

As a preliminary step, could you give us your ideas of what might be worked out on this? When this has been received here, we will be in a position to develope it with our Merchandising Department. I don't want to bring it up for [211] discussion until I know what the answers are to the questions which will be asked.

Regarding the report on our sales for the quarter ending November 30th, this will be ready shortly. It takes almost thirty days for the auditing report to go through the mill, and it is on our schedule for attention as soon as these figures are received by us. I am quite satisfied that when we get these figures, they will be pleasing both to yourselves and us.

Extending to you folks our very best wishes for a Happy Holiday Season.

Sincerely yours,

GAMBLE-SKOGMO, INC.,

/s/ MIKE,

Real Estate Department.

MFHoben:bg [212]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo Inc.
Operating Gamble Stores
700 Washington Ave. North,
Minneapolis, Minn.

In Reply Please Refer to:

M. F. Hoben.

January 15, 1945.

B. P. McNair Co.,
1st Nat. Bank Bldg.,
Great Falls, Montana.

Attention: Chet McNair.

Dear Chet:

Total Net retail sales for the first three-quarters of our lease year with you, are \$179,357.63.

The full lease year will end February 28th at which time a complete report and remittance of additional rent due will be sent you.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department.

BG:py

P. S. I have checked the lease and can find nothing in that certain lease between Ario and Western Auto requiring you to pay the charges on garbage and refuse assessment. We are writing to the Lease Dept. of Western Auto inquiring whether they have

Defendant's Exhibit No. 16—(Continued)

been obligated to pay this in the past. As soon as we hear from them, the issue should be settled one way or the other.

BG [213]

Gamble-Skogmo Inc.
Operating Gamble Stores
700 Washington Ave. North,
Minneapolis, Minn.

In Reply Please Refer to:

B. A. Green.

April 6, 1945.

B. P. McNair Co.,
Great Falls, Montana.

Gentlemen:

We are pleased to make a report for the twelve month lease period ending February 28, 1945. Sales for the full period amounted to \$259,463.65.

We are sorry that the sales were not large enough to provide for additional rental. Presume that this is caused by the fact that the store did not occupy the enlarged quarters for the full twelve month period, having spent some time in the small store.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department.

BAGreen:py

Defendant's Exhibit No. 16—(Continued)

(Pencil notation)

259,463.65 total

179,357.63 9 mos.

80,106.02 Dec. Jan. Feb. [214]

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager

B. P. McNair Company

First National Bank Building

Great Falls, Montana.

June 11, 1945.

Gamble-Skogmo, Inc.,

700 Washington Avenue North,

Minneapolis, Minnesota.

Attention: Mr. K. T. Watters.

Dear Ken:

Under date of April 6th, last, we received a report from Mr. B. A. Green of your office giving total sales for your first lease year in Great Falls, ending February 28th, last. When you were last in Great Falls we discussed briefly the matter of quarterly reports and you advised that the quarterly reports mentioned in the lease applied only to wholesale figures. I will agree the language might be confused so as to make it appear as you suggested. That, however, was not the intent at the time the lease was negotiated and concluded. It was the in-

Defendant's Exhibit No. 16—(Continued)

tent of Mr. Hoben and ourselves that the quarterly sales report plus any overage earned was to apply to all sales, retail as well as wholesale. I am sure if you will ask Mr. Hoben about this point he will bear me out.

Since our second lease year began on March 1st, there is a report due on total sales for March, April and May, which we [215] will appreciate receiving at the earliest convenience of your Accounting Department. For purposes of comparison we would like also to have you send us sales for lease quarters for the period March 1st, 1944, through February 28th, 1945. Under date of January 15th, you gave us sales figures for the first three quarters but they were lumped in one figure. Please talk to Mike on this point and give it some attention.

With best regards from my brother and myself to all of you.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ CHET,

C. S. McNAIR.

ew/ [216]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo Inc.
Operating Gamble Stores
700 Washington Ave. North,
Minneapolis, Minn.

In Reply Please Refer to:

M. F. Hoben.

July 2, 1945.

B. P. McNair Co.,
1st Nat. Bank Bldg.,
Great Falls, Montana.

Attention: C. S. McNair.

Dear Chet:

We are pleased to hand you herewith, report on the net retail sales for the first quarter of the new lease year beginning March 1, 1945. Retail sales for this three month period amounted to \$54,175.44.

We are also pleased to comply with your request of the 11th, asking for the retail sales by quarters for the lease year ending February 28, 1945:

1st quarter—March 1 thru May 31.....	\$ 11,394.29
2nd quarter—June 1 thru August 31....	80,306.00
3rd quarter—Sept. 1 thru Nov. 30.....	87,657.34
4th quarter—Dec. 1 thru Feb. 28.....	80,106.02
<hr/>	
Total For Lease Year Ending 2-28-45	\$259,463.65

Defendant's Exhibit No. 16—(Continued)

We trust that this covers the information asked for in your letter and are happy to send it to you.

Kind personal regards.

Yours truly,

GAMBLE- SKOGMO, INC.,

/s/ MIKE,

Real Estate Department.

MFHoben:bg

(Pencil notation)

54,175.44

2%

108,350.88 earned

450

3 mos.

1350.00 pd. [217]

Gamble-Skogmo Inc.

Operating Gamble Stores

700 Washington Ave. North,

Minneapolis, Minn.

In Reply Please Refer to:

M. F. Hoben.

October 15, 1945.

McNair Reality Company,

Great Falls, Montana.

Attention: Chet McNair.

Dear Mr. McNair:

We are pleased to hand you herewith report on

Defendant's Exhibit No. 16—(Continued)
the net retail merchandise sales for the second quarter of the current lease year for our store in Great Falls.

Sales for this second quarter amounted to \$62,179.43, which makes a total of \$116,354.87 for the first six months' period of this lease year.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department,
Secretary to Mr. Hoben.

(pencil note) June-July-Aug.

Entered 12-15-45. [218]

Gamble-Skogmo Inc.
Operating Gamble Stores
700 Washington Ave. North,
Minneapolis, Minn.

In Reply Please Refer to:

M. F. Hoben.

December 17, 1945.

McNair Realty Co.,
Great Falls, Montana.

Gentlemen:

According to our lease agreement with you, we are pleased to report to you the total net retail sales for the third quarter of this lease year—September,

Defendant's Exhibit No. 16—(Continued)

October and November—in our store in Great Falls.

Sales for this peroid amounted to \$67,579.81.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department,

Secretary to Mr. Hoben.

Gamble-Skogmo Inc.

Operating Gamble Stores

15 North Eighth Street,

Minneapolis 3, Minnesota.

April 11, 1946.

McNair Realty Company,

Great Falls, Montana.

Gentlemen:

We are pleased to hand you herewith, a report on the net retail sales for our store in Great Falls for the twelve month lease period ending February 28, 1946.

Net retail merchandise sales for this period amounted to \$254,359.05. The lease provides for a percentage on retail sales over \$270,000.00 per lease year.

Yours very truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department.

BAGreen:py [220]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo Inc.
Operating Gamble Stores
15 North Eighth Street,
Minneapolis 3, Minnesota.

July 9, 1946.

B. P. McNair Company,
First National Bank Building,
Great Falls, Montana.

Attention: Mr. Chet McNair.

Dear Chet:

We will try to answer several questions regarding net retail sales, etc. Net retail sales are gross retail sales less returned merchandise or repossessed merchandise sold on contract. Such merchandise, whether returned by the customer, or repossessed on contract is placed for resale purpose and again becomes a part of retail sales when made.

Regarding our percentage on general wholesale goods made on these premises, there has been none as we have been operating Great Falls on strictly retail activity. I wish it were possible to sit down across the desk and discuss the various questions you asked. It could be done much more satisfactory and complete.

With retail sales generally on the up-grade in the past year or so, I can understand your wonderment as to why Gamble sales have not followed the same pattern. One of the hardest hit from the standpoint of obtaining merchandise is our business. Our

Defendant's Exhibit No. 16—(Continued)

buyers and merchandisers have done a marvelous job in [221] filling in the items lost during the war or greatly curtailed through the war and since. If I remember correctly, we lost over 1600 some items, a great many of which have not yet become available. This is especially true when we refer to such items as washers, refrigerators, radios, household appliances, furniture, and dozens of others. We have been greatly discouraged at times because of the slowness these items have returned to our stores. It is more difficult to buy furniture today than at any period since the war began. Washers have come through in a very feeble drizzle and refrigerators even less than that. Radios that were promised us in a sufficient volume—practically nothing has come through. I am not trying to weep on your shoulder but merely to make a correct statement of what has held our retail volume down. It would be much less than it is, if our buyers had not been able to acquire various other lines of merchandise to fill in. However, you will realize that we are restocking completely and remodeling our basement for sales use. Our figures on Great Falls are in the "red" probably much greater than you imagine, but we are not discouraged. We have now completed the remodeling of the basement, and we are remodeling and installing a new mezzanine floor, [222] and we also feel we are nearing the beginning of the period where all of the merchandise I mentioned will begin to flow in, and I hope it will be close to immediately. You will be happy with the returns you will receive from sales activity in these premises.

Defendant's Exhibit No. 16—(Continued)

Our sales figures have lately picked up a little bit. For the first five months of 1946, they show 14.2% increase—not much to brag about but certainly headed in the right direction. Also, as of that date, we are more than \$5,000 in the “red.” There is nothing wrong in our sales that can not be corrected immediatly upon receipt of ample and proper merchandise. I am very hopeful that this is close at hand.

I have had plans several times to visit Great Falls. I have looked forward to such a trip and a visit with you and your brother, Ben, whom I have never met. I still have this in mind, and I hope it will be possible before too long. In the meantime, please do not be too critical of all that has happened, because I will wager that the returns earned for you folks will be very pleasing to you in a short time and may make up for the lack of additional rental in this foregoing period.

When we have our grand opening for the remodeling and additional [223] stocking we have completed, I will estimate that our total sales for the first two (2) week period will be in the neighborhood, more or less, of \$100,000.00.

Regarding the lease on the lot and warehouse at the rear. The company has stood firm against a percentage arrangement on the lease. As originally mentioned, the rental was to be \$60.00 a month and we did not have any mention of the percentage sales that I was aware of. However, Chet, I do not wish to be arbitrary and I will recommend to the com-

Defendant's Exhibit No. 16—(Continued)

pany a flat rental of \$75.00 a month, running concurrent to this main lease. If this meets with your and Ben's approval, I will prepare the lease and send it to you.

Phil Chandler expects to be in Great Falls next week, beginning by July 10, and intends to visit with you regarding the additional property you have in mind for our farm store use. I have discussed this with him and he has the information.

Kindest personal regards to you and your brother.

Sincerely yours,

GAMBLE-SKOGMO INC.,

/s/ MIKE F. HOBEN,

Real Estate Department.

MFHoben:do [224]

C. S. McNair

B. P. McNair

W. Robt. Gilchrist. Manager

B. P. McNair Company

First National Bank Building,

Great Falls, Montana.

July 12, 1946.

Mr. Mike F. Hoben, Real Estate Department.

Gamble-Skogmo, Inc.,

15 North 8th Street,

Minneapolis 3, Minnesota.

Dear Mike:

Your letter of July 9 explaining in such thorough detail the lack of volume in the Great Falls store is

Defendant's Exhibit No. 16—(Continued)

at hand and thank you. I see the Irish have not lost their conversational ability even if it has to be reduced to writing. I might have been shorter if you had said that all available merchadise was being sent to Aberdeen and Havre rather than to Great Falls and the older stores. We hope, however, that someday we can stop being a step child and maybe the grand celebration on the new basement and balcony will do the trick. Will buy you a drink if it does and you can buy us one if it doesn't.

Thanks also for the explanation of "net retail sales." We understand the ordinary definition of "net" and "retail." The point involved was whether or not there were wholesale sales made on the premises and which were not credited to sales volume. Your letter assures us definitely that this is not the [225] case, but we still insist that our understanding is that had there been wholesale business from the premises those figures should have been included in the total sales volume.

In connection with the reporting of sales, may we call your attention to the fact that on June 10 a statemnt was due us of the sales volume had for March, April and May. It is now July 12 and we are still waiting. Please do what you can to apply a torch to Mr. B. E. Green. It is good to hear that sales are up 14% in the local store for 1946 but, while that is comforting in one way, it is depressing when compared to Gamble's 50% increase in sales nationally for the same period.

We have had a couple of long and pleasant visits

Defendant's Exhibit No. 16—(Continued)
with Phil Chandler, who left this afternoon, and to whom we have mailed a memo of our conversations. He will go over the points involved, including a possible new building for farm sales on the vacant part of the property where you now utilize a small warehouse.

Best regards.

Very truly yours,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR.

CSM:SHP [226]

Gamble-Skogmo Inc.
Operating Gamble Stores
15 North Eighth Street
Minneapolis 3, Minnesota.

July 26, 1946.

McNair Realty Co.,
Great Falls, Mont.

Attention: C. S. McNair.

Gentlemen:

We are pleased to give you herewith, report on the net retail merchandise sales for the first quarter of the new lease year beginning March 1, 1946.

Net retail sales for this three month's period amount to \$73,018.20.

We are sorry that this report to you has been

Defendant's Exhibit No. 16—(Continued)
 delayed for this length of time, but we have just
 now received the sales figures.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department.

(Pencil Notations)

	73018	
Quarterly guar. sales	67500	
	<hr/>	
	5518	
“ Surplus sales @ 2%	.02	
	<hr/>	
	110.36	[227]
	<hr/>	

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager

B. P. McNair Company

First National Bank Building,

Great Falls, Montana.

August 14, 1946.

Gamble-Skogmo Inc.,
 15 North 8th Street,
 Minneapolis 3, Minnesota.

Attention: B. A. Green,

Real Estate Department.

Dear Sirs:

This will acknowledge with thanks your letter of

Defendant's Exhibit No. 16—(Continued)

July 26, reporting sales for the first quarter of the new lease year beginning March 1, 1946, of \$73,-018.20.

Under these figures additional rent is due for the period in the sum of \$110.00. You overlooked sending check with your sales statement and we would appreciate a remittance in that amount.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR.

CSMcN:md

(Pencil notation): Lease calls for payment "on a quarterly accounting."

OK/H [228]

Gamble-Skogmo, Inc.
Operating Gamble Stores
15 North Eighth Street,
Minneapolis 3, Minnesota.

October 14, 1946.

McNair Realty Company,
Great Falls, Montana.

Attention: Chet McNair.

Gentlemen:

We are very happy to enclose our check for \$1051.41 covering the accrued rental payment on our store in Great Falls from June 1st, 1946, through August 31st, 1946.

Defendant's Exhibit No. 16—(Continued)

It is with a great deal of pleasure that we make this payment because we know that we had built up your hope of our being able to achieve these sales figures.

This does not represent any abnormal sales in that our grand opening is still ahead of us, and we know from past experience that there will be a great increase due to this.

Mr. Hoben joins me in sending kindest personal regards.

Sincerely yours,

GAMBLE-SKOGMO, INC.,

/s/ P. C. FIKKAN,

Real Estate Department.

PCFikkan:p

Encl.-1 [229]

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager

B. P. McNair Company

First National Bank Building

Great Falls, Montana.

October 23, 1946.

Mr P. C. Fikkan,
Real Estate Department,
Gamble and Skogmo, Inc.,
15 North 8th,
Minneapolis, Minn.

Dear Sir:

Thank you for your letter of October 14th enclosing check in the amount of \$1051.41 for excess sales

Defendant's Exhibit No. 16—(Continued)
for the three month period, June through October.
We are very pleased that your store has gained
some momentum and apparently is under way.

For our records, would you be kind enough to forward us the sales figures for this period and make a notation with your accounting department to do this in the future.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ B. P. McNAIR.

GPMcN :hc [230]

Gamble-Skogmo, Inc.
Operating Gamble Stores
15 North Eighth Street,
Minneapolis 3, Minnesota.

November 1, 1946.

,
B. P. McNair Company,
1st Nat'l. Bank Bldg.,
Great Falls, Montana.

Gentlemen:

In compliance with the request in your letter of October 23rd, we are pleased to hand you herewith a report on sales by the month, beginning March 1st, 1946 and running through the end of August, 1946:

Defendant's Exhibit No. 16—(Continued)

Month	Monthly Sales	(Notations)
March, 1946	\$20,806.90	
April, 1946	25,953.86	
May, 1946	26,257.44	\$ 73,018.20
June, 1946	30,259.74	
July, 1946	32,783.43	
August, 1946	57,014.00	120,057.17
		<hr/>
		\$193,075.37

We hope that this recap gives you the information you request.

Yours very truly,

GAMBLE-SKOGMO, INC.,
/s/ B. A. GREEN,
Real Estate Department.

Gamble-Skogmo, Inc.
Operating Gamble Stores,
15 North Eighth Street,
Minneapolis 3, Minnesota.

January 20, 1947.

McNair Realty Company,
1st Nat'l. Bank Bldg.,
Great Falls, Montana.

Attention: B. P. McNair.

Dear Sirs:

We are pleased to advise that the last overage check sent you in the amount of \$1854.31 for the

Defendant's Exhibit No. 16—(Continued)
period from September through November, 1946,
was based on total net retail sales for the above-
mentioned quarter of \$160,215.40.

The lease provides that we pay 2% on all sales
over what would figure \$67,500.00 a quarter, which
in this case would be on an overage of \$92,715.40.

Yours very truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department.

Gamble-Skogmo, Inc.
Operating Gamble Stores
15 North Eighth Street,
Minneapolis 3, Minnesota.

April 22, 1947.

Mr. Ben McNair,
McNair Realty Company,
Great Falls, Montana.

Dear Ben:

It seems that I am going to be delayed on my trip
out in Montana so I am forwarding the check for
the balance on our percentage agreement.

The total net retail sales for the period beginning
March 1, 1946, to February 28, 1947, were \$567,-
737.96. Eliminating the base of \$270,000.00 this
gave an overage of \$297,737.96 on which we pay 2%
or \$5,954.75. On August 19, 1946, we paid \$110.36

Defendant's Exhibit No. 16—(Continued)

for the first quarter; on October 8, 1946, we paid \$1,051.14 for the second quarter; on January 8, 1947, we paid \$1,854.31 for the third quarter. This gives a total of \$3,015.81, which would leave a balance of \$2,938.35, the amount of which you will find our check enclosed.

Ben, we feel quite pleased to be able to pay you this amount and I am sure that you are much more satisfied with this kind of program. It can, and I think will be, even greater this year and in future years.

We hope that the program which you and I have discussed for further expansion in the way of farm store and such can be [233] developed if and when these building costs get to a point that is sensible for you to make the investment and for us to try to pay a rental on new construction.

With kindest personal regards.

Sincerely yours,

GAMBLE-SKOGMO, INC.,

/s/ P. C. FIKKAN,

Real Estate Department.

PCFikkan:de

encl:1 [234]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street,
Minneapolis 3, Minnesota.

July 14, 1947.

McNair Realty Company,
Great Falls, Montana.

Gentlemen:

We are pleased to enclose herewith, our check in the amount of \$1,749.32, intended as the accrued rental payment earned through the operation of the percentage clause in your lease for the first quarter of the lease year running from March 1, 1947, through May 31, 1947.

Net retail merchandise sales for this period amounted to \$154,965.88. Your lease is based on 2% on all net retail sales over \$270,000.00 per lease year. Therefore, you are paid 2% on the overage, for the first quarter, of \$87,465.88.

We are pleased to send this additional rental check to you.

Yours very truly,

GAMBLE-SKOGMO, INC.,

/s/ MIKE HOBEN,

Real Estate Department.

MFHoben:bg

Encl. 1

Defendant's Exhibit No. 16—(Continued)

(Pencil notation)

450

3

1350

154965.88

.02

309931.76 earned

1350 pd

1749.32 due & herewith. [235]

Gamble-Skogmo, Inc.

15 North Eighth Street,

Minneapolis 3, Minnesota.

October 15, 1947.

McNair Realty Company,

Great Falls, Mont.

Gentlemen:

We are pleased to report herewith, sales made in your building in Great Falls, occupied by our retail store, for the second quarter of this lease year, running from June 1, 1947, to August 31, 1947.

Sales for this period amounted to \$135,563.46. Our lease provides that we pay you 2% on all net retail sales over \$270,000.00 per year, or \$67,500.00 per quarter of a lease year. Therefore we pay you 2% on the overage of \$68,063.46.

We are enclosing our check in your favor in

Defendant's Exhibit No. 16—(Continued)
(O.K.) the amount of \$1361.27 as payment for same.

We are sorry to note that there was a drop in sales for the second quarter of the lease year, but hope and trust that there will be a considerable rise in the last two quarters.

Yours very truly,

GAMBLE-SKOGMO, INC.,

/s/ MIKE F. HOBEN,

Real Estate Department.

MFHoben:bg

Encl.-1 [236]

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager

B. P. McNair Company

First National Bank Building,

Great Falls, Montana.

October 20, 1947.

Mr. Mike F. Hoben,
Real Estate Department,
Gamble-Skogmo, Inc.,
15 North 8th Street,
Minneapolis 3, Minn.

Dear Mike:

This will acknowledge, with thanks, yours of October 15th inclosing a very nice check for excess rental on your Great Falls store.

All Great Falls sales are a little off for the period covered by your report, so you need not feel too

Defendant's Exhibit No. 16—(Continued)
badly especially in view of the fact you had a comfortable increase over the same period in 1946.

When your letter and check came in July covering March, April and May of this year I meant to write you a letter of thanks and congratulations. Just didn't get it done.

It looks now as though your Great Falls unit is really functioning and, of course, we are glad both for you and ourselves.

With kind personal regards and a *remembrance* to Ken Waters when you are in touch with him.

Yours sincerely,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR.

CSMcN:hc [237]

P. S. My secretary has just reminded me of something that possibly ought to come to your attention. Ever since the lunch counter went in (incidentally, how would you like to rent some more lunch counters at 2% on the gross), there does not seem to be adequate ventilation at your store. Both customers and clerks have complained of this situation, we are simply passing it along as a good-will suggestion. Sometimes a very few dollars spent for ventilating fans can work wonders. I was going to take this up with Theis, but he got his nice promotion and left too fast. I am not, as yet, acquainted with the new man. Regards again.

/s/ CHET. [238]

Defendant's Exhibit No. 16—(Continued)

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager

B. P. McNair Company

First National Bank Building,

Great Falls, Montana.

January 5, 1948.

Gamble-Skogmo, Inc.,

700 Washington Ave. North,

Minneapolis, Minnesota.

Attention: Mr. Mike F. Hoben,

Real Estate Department.

Dear Mike:

In December we should have received sales report for the quarter, September, October and November, 1947.

This report has not shown up as yet and we would appreciate having it within the next few days so as to include it in our 1947 figures, where it belongs.

With the hope you had a splendid Christmas and will have a wonderful New Year, we are,

Yours sincerely,

B. P. McNAIR COMPANY,

By /s/ CHET,

C. S. McNAIR.

CSMcN:hc [239]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street,
Minneapolis 3, Minnesota.

January 7, 1948.

B. P. McNair Company,
First National Bank Bldg.,
Great Falls, Montana.

Attention: C. S. McNair.

Dear Sir:

There has been a little delay in the audit as of December 1st. Therefore, a statement and check for additional rental will go forward as soon as Mr. Hoben returns to the office, which will be within a week.

Mr. Hoben has been confined to his home through illness since November 30th.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department,
Secretary to Mr. Hoben.

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street,
Minneapolis 3, Minnesota.

January 21, 1948.

McNair Realty Co.,
Great Falls, Mont.

Gentlemen:

We are pleased to report herewith on the sales made in your building in Great Falls, occupied by our retail store, for the third quarter of this lease year, running from September 1, 1947, to November 30, 1947.

Sales for this period amounted to \$142,227.38. Our lease provides that we pay you 2% on all net retail sales over \$270,000.00 per lease year, or \$67,500.00 per quarter of a lease year. Therefore we pay you 2% on the overage of \$74,727.38.

We are happy to enclose our check in your favor in the amount of \$1494.55 in payment of same.

Kind personal regards and Best Wishes for the New Year.

Yours very truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department.

Defendant's Exhibit No. 16—(Continued)

(Notations)

142227.38

67500

74727.38

2

149454.76

Encl.-1 [241]

Gamble-Skogmo, Inc.
15 North Eighth Street,
Minneapolis 3, Minnesota.

March 31, 1948.

McNair Realty Co.,
Great Falls, Mont.

Gentlemen:

We are pleased to report herewith on the sales made in your building in Great Falls, occupied by our retail store, for the fourth and final quarter of the lease year, running from December 1, 1947, to February 29, 1948.

Sales for this period amounted to \$155,553.18. Our lease provides that we pay you 2% on all net retail sales over \$270,000.00 per lease year, or \$67,500.00 per quarter. Therefore, we pay you 2% on the overage of \$88,053.18 for this fourth quarter.

Defendant's Exhibit No. 16—(Continued)

We are happy to enclose our check in your favor
in the amount of \$1761.06 in payment of same.

Yours very truly,

GAMBLE-SKOGMO, INC.,

/s/ M. F. HOBEN,

Real Estate Department.

(Pencil notations)

155,553.18

67,5

88,053.18

2

176,106.36

(Attached adding machine tape)

Sales 154,965.88

135,563.46

142,227.38

155,553.18

588,309.90

Rent 1,749.34

1,361.27

1,494.55

1,761.06

5,600.00

11,966.20

MFHoben:bg

Encl.-1 [242]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street
Minneapolis 3, Minnesota
Main 0281

July 6, 1948

(Pencil notation)

Unit #1.	General store	165,455.31
#2.	Lunch counter	9,258.35
#5.	Farm	64,398.63
		<hr/>
		239,112.29

McNair Realty Company
Great Falls, Montana

Gentlemen:

We are pleased to enclose herewith a report on the net retail sales for the first quarter of the new lease year beginning March 1, 1948, together with our check in payment of the additional rental earned for you through the operation of the percentage clause.

Net retail merchandise sales for the three month period from March 1, 1948, through May 31, 1948, amounted to \$77,122.98. Our lease provides that we pay you 2% on net retail sales over \$270,000, or \$67,500 per quarter. Therefore the attached check in the amount of \$192.46 is based on the overage for the quarter of \$9,622.98.

Defendant's Exhibit No. 16—(Continued)

We are happy to be able to send this additional rental to you.

Yours very truly,

/s/ WM. T. HILL,

Real Estate Department.

WTH:bg

Encl. 1

(Notations)

77,122.98	450		(4384 Dale Cockayne
<u>2</u>	<u>3</u>		
154,245.96	1350		
<u>1,350.</u>			
192.46	Farm #5	Unit 2	Fountain Lunch
	36,042.07	3,004.15	
	13,009.27	3,310.50	Apr. 53,819.21)
	<u>15,347.29</u>	<u>2,943.70</u>	Mar. 54,229.87) Unit 1
	64,398.63	9.258.35	May <u>57,406.23)</u>
			165,455.31

These figures furnished by Cockayne).

B. P. McNair Company,
Great Falls, Montana.

C. S. McNair

B. P. McNair, Jr.

July 8, 1948.

Gamble-Skogmo, Inc.,
700 Washington Ave.,
Minneapolis, Minn.

Attention: Mr. Wm. T. Hill,
Real Estate Department.

Dear Mr. Hill:

Thank you for your letter of July 6th enclosing
Check, \$192.46.

Defendant's Exhibit No. 16—(Continued)

The total sales figures for March, April and May, \$77,122.98, struck us as being somewhat low for the quarter. We thereupon called Mr. Dale Cockayne, Manager here to ask him if there could be an error. He says there undoubtedly is.

We are, therefore, returning your check herewith and will ask you to review the sales figures for Great Falls for the months of March, April and May.

While the lease does not make it incumbent upon you to furnish figures for each month separately, we would appreciate having them in that way if you have no objection.

With sincere regards to yourself and Mike Hoben, we are

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR.

CSMcN:hc

encl. [244]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street,
Minneapolis 3, Minnesota.

July 12, 1948.

B. P. McNair Company,
Great Falls, Montana.

Attention: Chet McNair.

Dear Chet:

It is certainly embarrassing to have made such an error in percentage report and check, but our figures come from the Accounting Department for this purpose. I should have noticed the differential immediately before sending you the record.

The following is the correct monthly statement which I am sure is much more satisfactory.

Sales:

March	\$ 54,004.97
April	41,328.93
May	58,632.06
<hr/>	
Total	\$153,965.96
Minimum	67,500.00
<hr/>	
Overage	\$ 86,465.96
	.02
<hr/>	
Pay	\$ 1,729.32

I, too, would have been very surprised to receive a small check such as you did. I hope that you will

Defendant's Exhibit No. 16—(Continued)
take my name off the blackboard now that we have corrected it.

With kindest personal regards to you and Ben.

Yours very truly,

/s/ BILL,

WM. T. HILL,

Real Estate Department.

WTH:ms [245]

B. P. McNair Company
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

July 17, 1948.

Gamble-Skogmo, Inc.,
15 North Eighth Street,
Minneapolis 3, Minn.

Attention: Mr. Wm. T. Hill.

Dear Bill:

We have your letter of July 12th with the corrected sales figure for March, April and May on the Great Falls store and enclosing check, \$1,729.32

I think these figures will bear still another reviewing. You report total sales for the period of \$153,965.96. For the same period last year you reported \$154,965.88.

We are at a loss to understand how the sales can be less this year than last, when we have had consistently glowing verbal reports from different

Defendant's Exhibit No. 16—(Continued)

Gamble men as to the large increase being made under the new Manager.

It could be that you have not included farm sales. In that event, they should be added to your total for while the lease does not mention farm sales specifically, there never was any misunderstanding as to the fact that all sales, except to employees, and even including Mail Order which might originate in the City of Great Falls, or at any other location here were to be included in the computation of volume.

Wholesale sales, if any, were to be reported specifically and figured on a 1% basis. [246]

These points were carefully covered between Mr. Hoben and ourselves and I am sure Mike will recall the circumstances. We even kidded about the Landlord being eligible for employee's discounts and Mike said we will write that in the lease too.

Please check the whole picture again, Bill, and let us have your considered advices.

With regards to both yourself and Mike,

Yours very truly, .

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR.

CSMcN :hc [247]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street
Minneapolis 3, Minnesota

August 3, 1948.

Mr. Chet McNair,
B. P. McNair Company,
Great Falls, Montana.

Dear Mr. McNair:

Please find enclosed your check for additional rental in the amount of \$309.76. We delayed in sending this final report to you until the accountant returned from his vacation that generally handles this account.

He has spent several days getting the correct figures together. Needless to say, we are much chagrined because of the previous report.

However, this is positively right and certainly hope that you will forgive us for these errors.

Yours very truly,

/s/ WM. T. HILL,

WM. T. HILL,

Real Estate Department.

WTH:ms

Encl.-1 [248]

Defendant's Exhibit No. 16—(Continued)

B. P. McNair Company

Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

August 7, 1948.

Gamble-Skogmo, Inc.,

15 North 8th Street,

Minneapolis 3, Minnesota

Attention: Mr. William T. Hill.

Dear Mr. Hill:

We are today in receipt of your letter August 3rd enclosing additional excess rent check of \$309.76 to cover the period of March, April and May, 1948.

This is the third check in connection with this report and the matter is still unsatisfactory. This time you have failed to send us a signed statement of sales or to show how this second additional amount is arrived at.

We will expect a full and complete accounting for the period and hereafter would appreciate such statements by the 15th of the month following the closing of each quarterly period. The present settlement is approximately sixty days late.

Yours very truly,

B. P. McNair Company,

By /s/ C. S. McNAIR,

C. S. McNAIR.

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street
Minneapolis 3, Minnesota

August 30, 1948.

B. P. McNair Company,
Great Falls, Montana.

Gentlemen:

Following is a complete report on our net retail merchandise sales made during the months of March, April and May, 1948, at our store in Great Falls, Montana:

Sales for March	\$ 55,081.49	(Notation)
Sales for April	55,210.18	figure used
Sales for May	59,162.34	
	<hr/>	
	\$169,454.01	

Payment based on 2% on the overage of \$101,954.01, makes your additional earning for the period amount to \$2039.08.

One check in the amount of \$1729.32 was forwarded to you on July 12th and another check for the balance was forwarded to you on August 3rd.

We trust this report will meet with your satisfaction.

Yours very truly,

/s/ B. R. GUSTAFSON,
Chief Accountant.

Defendant's Exhibit No. 16—(Continued)

(Notation)

450

3

1350

169454.01

.02

3389.0802

1350.

2039.08 [250]

B. P. McNair Company
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

September 1, 1948.

Gamble-Skogmo Inc.,
15 North Eighth Street,
Minneapolis 3, Minnesota.
Real Estate Department.

Dear Sirs:

Please refer to our letter of August 7th addressed to the attention of Mr. William T. Hill. We have had no reply to this letter.

May we ask you to furnish us with a complete report of your Great Falls sales for the lease period covering March, April and May?

Defendant's Exhibit No. 16—(Continued)

We would also appreciate receiving, not later than September 15th, a sales report and accounting for the lease quarter covering June, July and August.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR.

CSMcN:hc

(Pencil note)

August sales are not available before Sept. 25 at the earliest.

B. G. [251]

Gamble-Skogmo, Inc.

15 North Eighth Street

Minneapolis 3, Minnesota

September 2, 1948.

B. P. McNair Company,

Real Estate,

Great Falls, Montana.

Attention: C. S. McNair.

Dear Mr. McNair:

You no doubt have received the accountant's computation in writing by this time for the sales covering March, April and May.

Just as soon as the August sales are available we

Defendant's Exhibit No. 16—(Continued)
will give you a definite report for June, July and August as requested. It will be around the 25th of September before these are available.

Yours very truly,

/s/ WM. T. HILL,

WM. T. HILL,

Real Estate Department.

WTH:ms [252]

B. P. McNair Company
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

September 4, 1948.

Gamble-Skogmo, Inc.,
15 North Eighth Street,
Minneapolis 3, Minn.
Real Estate Department.

Attention: Mr. Wm. T. Hill.

Dear Mr. Hill:

We have Mr. Gustafson's report of sales covering March, April and May.

It is evident that he did not include any so-called farm sales figures in this computation.

In my letter of July 17th I touched on that point but you have disregarded it in your several letters

Defendant's Exhibit No. 16—(Continued)
and we would like to have you clarify it from your
viewpoint.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR.

CSMcN:hc

(Notation)

\$2039.08 [253]

B. P. McNair Company
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

September 20, 1948.

Gamble-Skogmo, Inc.,
15 North 8th Street,
Minneapolis 3, Minn.
Real Estate Department.

Attention: Mr. Wm. T. Hill.

Dear Mr. Hill:

This is to call your attention to the fact that we
have not received any sales report on your Great
Falls store for the period covering June, July and
August.

Also, we have had no reply to our letter of Sep-
tember 4th inquiring as to farm sale figures for the
previous period covering March, April and May.

Defendant's Exhibit No. 16—(Continued)

May we ask that you give both of these matters your attention.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR.

CSMcN:hc [254]

Gamble-Skogmo, Inc.
15 North Eighth Street
Minneapolis, Minnesota

B. P. McNair Co.
Great Falls, Mont.

September 27, 1948.

Attention: C. S. McNair.

Dear Chet:

Your letters of September 4th and 20th addressed to Mr. Hill come to my attention.

I am a little bit confused regarding your request for an accounting of farm machinery sales made on other premises than those leased from you by us. Our lease with you folks on the West half of Lot Eight (8) and on Lot Nine (9), Block Three Hundred Sixteen (316), Town or Townsite of Great Falls, Montana, is the only lease with you requiring settlement on retail sales made. All of our reports and payments cover only sales made on these de-

Defendant's Exhibit No. 16—(Continued)

scribed premises. No reports on the sale of merchandise, farm machinery, etc., is made on other property rented from you or on property rented from others in Great Falls.

We are satisfied that if you will examine your existing lease, Paragraph Two, it will state this very clearly. I would mention that at the time you and I negotiated this original lease, no mention or discussion of sales of farm machinery was had because at that time, our company had no thought of engaging in farm machinery business. Our company's handling of farm machinery came about at a much later date.

We trust that this will clarify the matter to [255] your satisfaction as well as ours.

Kind personal regards.

Sincerely yours,

/s/ MIKE F. HOBEN,

M. F. HOBEN,

Real Estate Department.

MFH:bg

cc: Dale Cockayne, #1282-1.

Jim McNaught, Dist. Mgr.

Phil Fikkan, Regional Mgr. [256]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street
Minneapolis 3, Minnesota

B. P. McNair Co.
Great Falls, Mont.

Ocotober 18, 1948.

Dictated 10-15-48.

Attention: Mr. Chet McNair.

Dear Chet.

I have purposely held up answering your letter of September 29th until I could dig up additional information on the complaint you made.

First of all, Mrs. Green tells me that there was an error first by her in compiling the July 6th report; then on the second complaint, she investigated and found an additional error in the Accounting Department's figures, etc. All of this is very distressing, and I was sorry to learn of it, but we all have to recognize that to err is human and that even our company, with its earnest effort, cannot escape an occasional happening such as you complain of, and I think you had just cause for complaint.

I offer my apology for myself and our company for any inconvenience and disturbance it might have casued you and Brother Ben. I do not know just when I can be in Great Falls. I am still receiving treatment at Rochester, and this will continue for some time, but as you are an occasional visitor to Minneapolis, I would welcome an opportunity to discuss the subject matter with you.

Defendant's Exhibit No. 16—(Continued)

We are also happy to enclose our check in the amount of \$1749.61 as the accrued rental earned for the second quarter [257] of June, July and August, together with the statement on sales as follows:

June	\$ 51,382.00	
July	51,559.36	(Notation)
August	52,039.04	over
<hr/>		
Total	\$154,980.40	

I trust this finds you and your brother enjoying good health, and I want you to feel free to write to me at any time either with complaint or praise, whichever the situation warrants. I assure you it will have my immediate and prompt attention.

Sincerely yours,

/s/ M. F. HOBEN,

M. F. HOBEN,

Real Estate Department.

MFH:bg

(reverse aide)

154,980.40	450
2	3
<hr/>	
3,099.6080	1350
1350	
<hr/>	
1,749.60	[258]

Defendant's Exhibit No. 16—(Continued)

B. P. McNair Company
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

October 28, 1948.

(Pencil notation—B. Berghuis to answer)

Gamble-Skogmo, Inc.,
15 North 8th Street,
Minneapolis 3, Minn.

Attention: Mr. M. F. Hoben,
Real Estate Dept.

Dear Mike:

We are sorry to hear of your continued illness and hope that it will be short duration.

This will acknowledge your letter of October 18th in regard to our Great Falls lease and containing what purports to be a sales report for the Quarter ending August 31st, 1948.

This report is unsatisfactory, first, for the reason that it is a matter of some six weeks late and, second, for the reason that for a sales report it certifies nothing.

Your letter also purports to answer our letter of September 29th but fails to make any mention of the point raised in the fifth paragraph as regards unreported farm sales for the quarter ending May 30th, 1948.

In view of your own illness and the continued unsatisfactory replies which we get when we get any

Defendant's Exhibit No. 16—(Continued)
replies from your Real Estate Department, we regret that it becomes necessary to take the matter up with some other department of your Company and accordingly [259] are today addressing Mr. P. W. Skogmo whose name appears on our lease.

Yours very truly,

McNAIR REALTY COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR,

Pres.

CSMcN:hc

cc. Mr. P. W. Skogmo, Pres. [260]

B. P. McNair Company

Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

October 28, 1948.

(Pencil notation: Bill Hill's handling.)

Mr. P. W. Skogmo, President,
Gamble-Skogmo, Inc.,
15 North 8th Street,
Minneapolis 3, Minnesota.

Dear Sir:

The attached copy of a letter written today to Mr. Hoben is self-explanatory insofar as it goes.

We address you with the request that you review the entire file in connection with this lease, either

Defendant's Exhibit No. 16—(Continued)

yourself, or, if that is impracticable, that you have it reviewed by someone who is not connected with the Real Estate Department.

After such review we would appreciate hearing from you at your convenience and with any comments you care to make.

We have been reluctant about going over the head of the Real Estate Department but matters have been handled so unsatisfactorily for the past four years that we are left with no alternative.

In the event that your file is not available or should appear incomplete, we can send you a copy of ours.

Yours very truly,

McNAIR REALTY COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR,

Pres.

CSMcN:hc

encl. [261]

Gamble-Skogmo, Inc.

15 North Eighth Street

Minneapolis 3, Minnesota

November 5, 1948.

Mr. C. S. McNair, President,
B. P. McNair Company,
Great Falls, Montana.

Dear Mr. McNair:

Mr. P. W. Skogmo, President of our Company, has handed me your letter of October 28 in connec-

Defendant's Exhibit No. 16—(Continued)

tion with our lease with you covering the store building at Great Falls.

Mr. M. F. Hoben, Head of our Real Estate Department, with whom you previously corresponded, is in the hospital at Rochester, Minnesota. Mike has had a very rough time of it this year, in that last spring he was at Rochester for several months at which time the surgeons amputated his left leg above the knee and he was just endeavoring to learn how to use an artificial limb, when he had to go back to Rochester where the surgeons have now amputated his right leg just below the knee. As a result, he will have to remain in Rochester for at least several weeks more and all of this has left his department very short-handed but the remaining folks have done an outstanding job, we feel, in attempting to keep up with the work. Mike, of course, has always been a glutton for work and with him out of the office for months on end this year the other folks have just had to take over his work with the result that they sometimes necessarily fall a little behind with the work. I mention this because I have discussed with Mr. Walter Dreves, our Controller, the matter of getting [262] quarterly sales statements and quarterly percentage rent checks to you a little quicker. Mr. Dreves tells me that the quarterly statements of the Great Falls as well as other stores is usually compiled on or about the 20th day of the month following the close of the quarter and that being true, in the future, I see no reason why the quarterly statements can't be in

Defendant's Exhibit No. 16—(Continued)

your hands at least within thirty (30) days after the close of each quarter. I am sending copy of this letter to the Lease Department and am sure that in the future they will do their utmost to endeavor to get you the quarterly statement and your percentage rent check within thirty days after the end of each quarter. In the absence of Mr. Hoben, I have reviewed the entire file with Mr. William Hill of the Real Estate Department. First of all, I find that an unfortunate error was made in sending you the sales figures for the quarter consisting of March, April and May this year. Like all other big companies we are not immune to errors but in the final analysis it has worked out, I find, to your advantage at our expense. The sales for that quarter as reported to you and upon which we calculated the 2% rent amounted to \$169,454.01. Our lease with you, paragraph 2, provides "No percentage will be paid on wholesale sales to employees or sales or transfers of merchandise to other Gamble Stores." The sales figure of \$169,454.01 for the spring quarter included \$6,499.95 of sales at wholesale to employees and within the language of the lease you will see [263] that those figures should have been excluded. However, they were included with the result that we overpaid you \$129.99 (2% of \$6,499.95), for that quarter. We reported sales to you for the quarter ending August 31 in the amount of \$154,980.40 which amount includes \$5682.65 of sales at wholesale to employees and this again, within the terms of the lease, should have been excluded. However

Defendant's Exhibit No. 16—(Continued)

by including those sales, as was done, we overpaid you \$113.65 rent for that quarter. In other words, we overpaid our rent for the six months period ending August 31st, by \$243.64, so that while you may have become irked by the error that was made in reporting the sales to you with some delay, you can see from the foregoing figures that you have not by any means been hurt in the collection of rents.

I hope that the foregoing explanation clears up this entire matter to your satisfaction. The Company regrets, of course, that there should be any misunderstanding with any landlord over any matter and particularly with you folks for everyone in our Lease Department feels that you have been exceptionally fine landlords in the many years that we have had the pleasure of doing business with you and we hope to continue our relations on that friendly basis.

Yours very truly,

/s/ W. P. BERGHUIS,
General Counsel.

WPBerghuis:hb [264]

Defendant's Exhibit No. 16—(Continued)

, Gamble-Skogmo, Inc.
 15 North Eighth Street
 Minneapolis 3, Minnesota

November 15, 1948.

Mr. C. S. McNair, President,
B. P. McNair Company,
Great Falls, Montana.

Dear Mr. McNair:

I have your further letter of November 9 with reference to our lease.

While our lease with you does not provide for the furnishing certified reports of sales, we have no objection to doing so and I am accordingly enclosing sales figures for the two quarters which you requested, all certified by Mr. Walter J. Dreves, Controller of our Company.

I have had nothing to do in the past with the payment of rents on this or other property and accordingly I did not know just what procedure was followed in reporting quarterly sales. I find that the Lease Department people took off the sales from the store statement but, of course, the people in the Lease Department are none of them accountants, and with that type of procedure it was not unlikely that some errors would occur. Hereafter the quarterly figures will be certified to the Lease Department by either the Controller or his assistant, who are experienced accountants, of course, and through that procedure in the future we hope to minimize any errors such as have occurred in your

Defendant's Exhibit No. 16—(Continued)

case. From the certified figures as now enclosed you will observe that we have overpaid your rent and in line with your letter of November 9 we should be glad to [265] receive your refund check for the amount of the overpayment.

The figures included in the certified report herewith enclosed do not include farm sales for such farm sales do not come under the terms of your lease and are not subject to the percentage clause. As you know, we sell farm machinery from two other locations in Great Falls, one of which other locations we rent from you but that lease contains no percentage clause and the other location we rent from other parties. The farm store is entirely a separate unit, it carries its own inventory, none of which is located on your store property which we are corresponding about and, therefore, such sales do not constitute sales on the leased premises covered by our store building lease and for that reason there is no point in reporting the sales of the farm store to you.

Yours very truly,

/s/ W. P. BERGHUIS,
General Counsel.

WPBerghuis:hb

Encl. [266]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street
Minneapolis 3, Minnesota

December 30, 1948.

B. P. McNair Company,
Great Falls, Montana.

Attention: C. S. McNair.

Gentlemen:

We are pleased to report herewith on the sales made in your building in Great Falls, occupied by our retail store, for the third quarter of the lease year, running from September 1, 1948, to November 30, 1948.

September	\$ 60,897.59
October	71,417.61
November	78,288.41
	<hr/>
	\$210,603.61

Our lease provides that we pay you 2% on all net retail sales over \$270,000.00 per lease year, or \$67,500.00 per quarter. Therefore, we pay you 2% on the overage of \$143,103.61 for this third quarter.

We are happy to enclose our check in your favor in the amount of \$2,862.07 in payment of same.

Yours very truly,

/s/ WM. T. HILL,

WM. T. HILL,

Real Estate Department.

Defendant's Exhibit No. 16—(Continued)

(Pencil notations)

210,603.61

.02

4212.0722

1350.

2862.07

450

12

2/5400

2700.00

This check cashed but no acknowledgment made.

Gamble-Skogmo, Inc.
15 North Eighth Street
Minneapolis 3, Minnesota

March 25, 1949.

In Reply Please Refer to:

W. T. Hill.

McNair Realty Co.,
Great Falls, Mont.

Attention: Mr. Chet McNair.

Dear Mr. McNair:

We are pleased to give you herewith a report on the net retail merchandise sales obtained in your premises at 521-3-5 Central Avenue, Great Falls,

Defendant's Exhibit No. 16—(Continued)

which our store occupies, as handed to us by our Accounting Department for the period from December 1, 1948, through February 28, 1949:

December, 1948	\$ 98,830.24
January, 1949	37,190.65
February, 1949	32,343.86
<hr/>	
Total	\$168,364.75

Figured on a quarterly basis, we are to pay to you 2% on net retail merchandise sales over \$67,500 per quarter. Therefore, for the above-mentioned period, we pay you 2% on the overage of \$100864.75. Our check in the amount of \$2,017.30 is enclosed herewith.

We are happy to be able to send this check to you.

Yours very truly,

/s/ WM. T. HILL,

WILLIAM T. HILL,

Real Estate Department.

WTH:bg

(notation)

168364.75

2

336729.50

1350

2017.30 [268]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street
Minneapolis 3, Minnesota

In Reply Please Refer to:

April 6, 1949.

I, hereby certify that the amounts set forth below constitute the net sales under the terms of a lease agreement dated December 27, 1943, for the purpose of computing rentals due B. P. McNair Company for premises at 521-3-5 Central Avenue, Great Falls, Montana:

December, 1948.....	\$ 98,830.24
January, 1949	37,190.65
February, 1949	32,343.86

Total	\$168,364.75
Less Exempted Sales	67,500.00

Base Sales	\$100,864.75
Rental Rate	2%
Rental Payment	2,017.30

/s/ WALTER J. DREVES,

WALTER J. DREVES,
Controller. [269]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street
Minneapolis 3, Minnesota

April 6, 1949.

I, hereby certify that the amounts set forth below constitute the net sales under the terms of a lease agreement dated December 27, 1943, for the purpose of computing rentals due B. P. McNair Company for premises at 521-3-5 Central Avenue, Great Falls, Montana.

September, 1948	\$ 60,897.59
October, 1948	71,417.61
November, 1948	78,288.41

Total	\$210,603.61
Less Exempted Sales	67,500.00

Base Sales	\$143,103.61
Rental Rate	2%
Rental Payment.....	\$ 2,862.07

/s/ WALTER J. DREVES,

WALTER J. DREVES,
Controller [270]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
15 North Eighth Street
Minneapolis 3, Minnesota

June 29, 1949.

In Reply Please Refer to:

I, hereby certify that the amounts set forth below constitute the net sales under the terms of a lease agreement dated December 27, 1943, for the purpose of computing rentals due B. P. McNair Company for premises at 521-3-5 Central Avenue, Great Falls, Montana:

March, 1949	\$ 48,463.13
April, 1949	53,117.37
May, 1949	53,648.45

Total	\$155,228.95
Less Exempted Sales	67,500.00

Base Sales	\$ 87,728.95
Rental	2%
Rental Payment	\$ 1,754.58

/s/ WALTER J. DREVES,

WALTER J. DREVES,
Controller. [271]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.
Operating Gamble Stores
15 North Eighth Street
Minneapolis 3, Minnesota

October 4, 1949.

I, hereby certify that the amounts set forth below constitute the net sales under the terms of a lease agreement dated December 27, 1943, for the purpose of computing rentals due B. P. McNair Company for premises at 521-3-5 Central Avenue, Great Falls, Montana:

(1949) June	\$ 49,302.49
July	47,718.45
August	47,446.04

Total	\$144,466.98
Less Exempted Sales	67,500.00

Base Sales	\$ 76,966.98
Rental Rate	2%
Rental Payment	\$ 1,539.34

/s/ WALTER J. DREVES,

WALTER J. DREVES,
Controller. [272]

CHESTER McNAIR

resumed the stand and testified as follows:

Direct Examination

(Continued)

By Mr. Hall:

Q. The complaints that were made by you with reference to accountings and with reference to the amounts of checks remitted by the Gamble-Skogmo Company were in writing, were they not, Mr. McNair? A. Yes.

Q. I notice that some of the correspondence is on the letterhead of B. P. McNair Company or signed B. P. McNair Company, was that covering accounting as agent for the McNair Realty Company in that correspondence? A. Yes.

Q. Was there ever any accounting made on wholesale sales?

A. Never any accounting made on wholesale sales.

Q. And so far as you know then were you ever paid any percentage based upon wholesale sales during the entire period December 27th—of the December 27th lease?

A. Not that I am aware of.

Q. Was there ever any accounting made of the Gamble-Skogmo Company up to the year 1948 of total sales?

A. There were letters advising our total sales and such and such.

Q. Was that total sales or net retail sales?

(Testimony of Chester McNair.)

A. I believe there are letters showing net retail sales. [273]

Q. At any rate that shows in these letters?

A. That shows in this correspondence.

Q. In any event wholesale sales were eliminated entirely from any account?

A. So far as I know.

Q. So far as you know? A. Yes.

Q. Now the only information you have with reference to sales being made at any given time by the stores in Great Falls was by correspondence?

A. All written reports are received in that correspondence.

Q. Well, did you receive any other information with reference to sales being made? A. I did.

Q. And from whom?

A. In conversation with Mr. Cockayne in June or July of 1948 I was told by him that the sales for the current period could very considerably exceed the sales for the preceding quarter; and, of course, I was pleased at that and so was he. And he told me the sales, told me verbally what the sales for the last concluded quarter shows upon which we had no written report. He gave me those figures verbally at that time.

Q. And did the accounts which you received thereafter from the headquarters from Gamble-Skogmo vary considerably from the figures Mr. Cockayne gave you?

A. May I refer to my notes? [274]

(Testimony of Chester McNair.)

Q. I don't want to go into any figures. Did they vary considerably? A. The written reports?

Q. Yes, from the Minneapolis headquarters?

A. The first report was approximately one-fourth of the total amount as reported by Mr. Cockayne.

Q. And was it then you made complaint to the Minneapolis headquarters of Gamble-Skogmo with reference to the amount of the check you had received and the accounting that had been made?

A. Yes, I asked him to review their files. I said apparently there is some error here.

Q. And that was in the year 1948, was it not?

A. Yes.

Q. And that correspondence all appears, does it not, in the file which has been introduced in evidence as Defendant's Exhibit 16?

A. I presume so. I haven't examined that file but I judge it would.

Q. And finally after three or four attempts you finally achieved a result approximating the figure given you by Mr. Cockayne some time before?

A. No, there were several exchanges of letters, each time a protest on our part. We received three different checks covering the quarter ending May 31st, 1948. Three different checks, each time saying there has been a mistake made and we give you an additional check, and each time the [275] assurance that this time it is correct. And when we finally, in September, got a certified accounting the end of September covering the period ending in May it

(Testimony of Chester McNair.)

still was materially different from Mr. Cockayne's figures.

Q. So that you never did arrive at the identical figure?

A. We never arrived at a figure acceptable to us.

Q. Now going back to the time that you were negotiating the lease of December 27, 1943, with Mr. Hoben you finally arrived at a lease which was based upon a minimum rental of \$5400.00 a year or \$450.00 a month?

A. Yes.

Q. With a percentage based on net retail sales over and above \$270,000.00 per year?

A. That is correct.

* * *

Q. Let me get at it this way, then, Mr. McNair. When the store started out was there a lunch counter in there? [276]

A. No.

Q. And had you mentioned a lunch counter so far as this Mr. Hoben was concerned?

A. No.

Q. Was there any question but what the lunch counter was to pay 2% on net retail sales?

A. No discussion.

Q. Was there any discussion between you and Mr. Hoben with reference to farm sales?

A. No discussion. [277]

* * *

Q. And to bring the matter out there was no discussion of any lunch counter or luncheonette as such?

(Testimony of Chester McNair.)

A. There was no discussion of lunch counter or luncheonette. [278]

* * *

Q. What have you to say with reference to the desirability of the location at 521, from the standpoint of mercantile establishment that location at 521, 523, 525 Central Avenue?

A. I believe it is one of the most desirable locations in the city retail locations.

Q. Would that be your view of the matter as an experienced real estate man in the city of Great Falls? A. Yes.

Q. What have you to say about the minimum rental of \$450.00 a month, is that a reasonable rental considering the location and the size of the building?

A. Do you mean a reasonable flat rental?

Q. Yes.

A. No, it is not. It is far underneath, far under the value then or now as a rental.

Q. And would that rental pay you any return upon your investment? A. None.

Q. As a flat rental? A. No.

Q. About what are the taxes upon the property combined in the Gamble-Skogmo setup?

A. I believe the property taxes this past year were \$5200.00. [279]

Q. Does that include additional property other than Gamble-Skogmo? A. Yes.

Q. That includes also part of the building occupied by Duval-Wallace Hardware? A. Yes.

Q. And part occupied by Leslie's, does it not?

(Testimony of Chester McNair.)

A. Yes.

Q. And in addition to your original investment have you been compelled during the occupancy of the building by Gamble-Skogmo to put additional money by way of repairs in the building?

A. We have put two kinds of money into the—this premises you mean?

Q. Yes.

A. We have put two kinds of money into their premises, one would be normal repairs and one would be remodeling for their special purpose.

Q. Remodeling for the special purpose of Gamble-Skogmo? A. Yes.

Q. Do you recall now approximately the amount of money you had in your remodeling account, that is, that you have paid out for the benefit of Gamble-Skogmo? A. Yes, upwards of \$10,000.00.

Q. And so far as repairs are concerned can you give the amount you have expended during the occupancy of the building by Gamble-Skogmo? [280]

A. Yes, upwards of \$3,000.00.

Q. And does that include repairs in connection with the roof? A. Yes.

Q. And what have you to say whether or not a new roof has been placed on the building now occupied by Gamble-Skogmo?

A. A new roof was put on the building since their occupancy.

Q. Now when did you first discover, Mr. McNair, the fact that farm sales were not being in-

(Testimony of Chester McNair.)

cluded in the accounts or in the letters giving you the net retail sales?

A. Well I was surprised to learn they were not included during the summer of 1948.

Q. And how did you ascertain that fact that they were not being included?

A. I learned it because of the discrepancies in the figures quoted to us by Mr. Cockayne and in the figures representing sales quoted to us by the Minneapolis office.

Q. And did you and Mr. Cockayne in any conversation arrive at the conclusion that that must be the cause of the discrepancy?

A. I don't believe we ever discussed it as between ourselves.

Q. But you arrived at that conclusion by reason of the difference between the figures furnished by him and the figures furnished by the Minneapolis office? [281]

A. I arrived at it by comparison of the figures furnished by him and by the Minneapolis office.

Q. Yes. A. It was evident.

Q. And that occurred in 1948? A. Yes.

Q. And did you immediately make a protest?

A. Immediately.

Q. And those protests are included in Defendant's Exhibit No. 16? A. That is correct.

Q. And their response is there too?

A. That is correct.

Q. Were you ever furnished at any time with

(Testimony of Chester McNair.)

a statement of the amount of sales from the farm department?

A. Never. You mean from Minneapolis?

Q. Yes. A. No written statement ever.

Q. Did Mr. Cockayne ever furnish you with any such figures?

A. Yes, he gave me some figures orally.

Q. Did you talk with him in the business office at Gambles? A. Yes.

Q. And did he get it from the store reports such as we have here in court?

A. Yes, he got them from, I presume, that same book, one like it.

Q. And as a result of that protest were you ever furnished [282] by the Minneapolis office with any figures showing the farm sales?

A. Never. [283]

* * *

Q. Now after you found out, Mr. McNair, with reference to the elimination of farm sales from the accountings made by Gamble-Skogmo did you take any steps with reference to a termination of the lease of December 27th, 1943?

A. Yes, after some protests.

Q. You made various protests and then what did you do with reference to a termination of the lease? A. May I consult my notes a moment?

Q. Well, did you cause a notice to be served upon Gamble-Skogmo? A. Yes.

Q. That the lease was terminated by reason of the fact that they had not paid a proper rental?

(Testimony of Chester McNair.)

A. Well, we hoped it wouldn't come to that and we had some correspondence in connection with it and eventually we did serve such a notice.

Q. And that is the notice that is set forth in the plaintiff's complaint here, is it not? A. Yes.

Q. And can you tell me now about when that was done?

A. That notice was served—well, it was, I think, October 3rd, if I am thinking of the same notice.

Q. Yes, October 3rd, 1949?

A. October 3rd, 1949.

Q. Now after that—at that time did you have any information—and when I say “you”—did McNair Realty have any [284] information as to the amount of the wholesale sales and the farm sales which had been omitted from the accountings made by the Gamble-Skogmo Company over a period of years or the amounts which they owed you for rental? A. No information.

Q. For those items? A. No information.

Q. You had never received any such information from the Gamble-Skogmo Company? A. No.

Q. Did you take any steps to obtain that information?

A. Why, yes. You, as counsel, subpoenaed Mr. Cockayne and his records for a deposition.

Q. And his deposition was taken on October 24th, 1949? A. That is true.

Q. And at that time he produced the store records showing the total retail sales and the total wholesales in evidence? A. That is true.

(Testimony of Chester McNair.)

Q. And those are the store records which we have in court today, is it not?

A. That is true. [285]

* * *

Q. And were you thereafter advised by me Mr. Williams had called me with reference to the matter? A. I was.

Q. Did Mr. Williams ever tell you they were in a position to write checks? A. Yes.

Q. In connection with the matter was that that afternoon, the afternoon of October 24th or the next day?

A. That was the next day in your office.

Q. And was there a meeting arranged for between yourself and Mr. Williams?

A. By the next day——

Q. And Mr. Hill and myself for the next day?

A. By the next day, you mean——

Q. That would be October 25th?

A. It was arranged. We met in your office in the morning.

Q. And briefly the three of you and Mr. Cockayne appeared in the office, did you not?

A. Yes.

Q. And did anyone have a checkbook?

A. I presume it was a checkbook. I didn't examine it sufficiently.

Q. Well, who opened the conversation in my office if you recall?

A. I believe Mr. Williams.

(Testimony of Chester McNair.)

Q. And did he identify himself as being the representative, [286] that is, attorney for the Gamble-Skogmo Company?

A. He identified himself as being counsel for the representative.

Q. And what did he say?

Mr. Williams: If the court please, at this time I would like to object to this line of testimony and any future line of testimony on the ground that the evidence shows that these negotiations were of a compromise nature and evidence of a compromise nature is not properly admitted in evidence.

* * *

Q. And that didn't he make an offer so far as concerns [287] the disputed item of farm sales?

A. He said they worked during the preceding evening and arrived at a figure they thought represented 2% of the total sales.

Q. What was that figure? A. \$5,161.60.

Q. And how much did he offer to pay of that amount?

A. He said he was empowered to deliver us one-half of that amount in some sort of settlement.

Q. And what did you say to that?

A. I said the offer was refused.

Q. And did Mr. Williams say anything further?

A. He may not. Mr. Hill made some remarks.

Q. And what did Mr. Hill say after you had refused this offer?

A. Mr. Hill then said, "What do you want?"

(Testimony of Chester McNair.)

Q. And what did you say to that?

A. I said: "We don't want any compromise. We want the money that is due us and we want the premises that you have been occupying."

Q. And what did Mr. Hill say to that?

A. He said: "Why are we looked on with such disfavor as tenants?"

Q. And did you tell him?

A. I told him that over a six-year period——

Mr. Williams: Your Honor, I object to this line of [288] testimony as being incompetent, irrelevant and immaterial and also self-serving declaration.

The Court: Well, this Mr. Hill was questioned in regard to this same matter.

Mr. Hall: I have always understod where counsel brought out part of a conversation it was perfectly proper for the other side to bring out the entire conversation.

The Court: Yes.

Mr. Hall: Of course, it couldn't be under any circumstances a self-serving declaration.

The Court: Go ahead, tell him.

A. Mr. Hill asked me why they were such distasteful tenants and I proceeded to tell him.

Q. And after you had told them the reasons you considered them as distasteful tenants did Mr. Hill say anything further?

A. He said that was all quite true and he had only apologies to offer for their treatment of us in previous dealings.

(Testimony of Chester McNair.)

Q. And was anything further said by him with reference to the lease or the money?

A. Yes, he then inquired whether it would be possible on any footing for Gamble to treat with us for the premises for them to occupy the premises.

Q. And what did you tell him about that? [289]

A. I told him that when the premises were vacated they would be for sale to the best advantage or to our best advantage. They would be open to all comers and that Gamble could be treated on the same basis as any other prospective tenant wishing to lease the premises, and since he was on the ground floor at the moment if he wanted to enter into negotiations, then why we could talk with him first.

Q. And did you say anything about the Gambles or the fact that they were occupying the premises being given a preference or anything of that sort?

A. I said, yes, they had their fixtures in and there would be no lapse on business time or loss of sales or revenue and for that reason; I did tell him, however, that the terms of any new lease we might enter into would be far different from the terms of the former lease.

Q. Was there any further discussion in that meeting, Mr. McNair, with reference to the \$5,161.60 representing the percentage on the farm sales?

A. They said, they or one of them said it was correct to the best of their belief, it might vary a dollar or two or a few dollars, and if further search

(Testimony of Chester McNair.)

of the records disclose that, it would be rectified, and we said for all intents and purposes we would accept that figure, meaning that figure was authentic and we would also accept that amount in settlement. [290]

Q. Was there anything further said by either you——

The Court: I want to find out something further at that point from this witness. Does that mean, Mr. McNair, you would accept this \$5,161.60, or whatever it was, and continue the lease?

A. No, sir.

The Court: You wanted a new lease?

A. We wanted our premises and an end to this disagreeable situation, your Honor.

Q. (By Mr. Hall): In other words, to clear the matter up that Judge Pray just asked you, your position was that lease had been terminated, the old lease had been terminated on October 3rd?

A. Oh, yes, the lease was terminated.

Q. And you were demanding at that time first the payment of this \$5,161.60 and a new lease if Gambles desired to occupy the premises?

A. We didn't demand a new lease. We preferred to have the premises but as we took into account the fact they were in there we would treat them about a new lease and we wanted the \$5,161.60 in any event.

Q. And was there anything further said in the meeting in my office on October 25th between you or Mr. Williams, Hill or myself?

(Testimony of Chester McNair.)

A. Mr. Hill said something about reinstatement, or that [291] wasn't the exact term, but resuming the old lease, and I said there will be no reinstatement of the old lease. We just started to talk about the terms and conditions of a possible new lease. This was opening negotiations. Whereupon you said, "That is a matter wherein counsel needn't be concerned and Carter and I don't have to take up our time, why don't you and Mr. Hill retire to your office and work out anything you care to in regard to the matter."

Q. And about that time did you leave my office?

A. We thereupon left your office, Mr. Williams and Mr. Hill and myself.

Q. Mr. Cockayne?

A. And Mr. Cockayne. Excuse me.

Q. Did you all go together some place?

A. We went to my office.

Q. And who went to your office?

A. I believe Mr. Cockayne excused himself to go back to the store, Mr. Williams came up to the office with Mr. Hill and me and then shortly he left.

* * *

Q. Well, did you resume operations later on that day so [292] far as negotiations were concerned?

A. Yes, we discussed tentatively the terms and conditions.

Q. And for about how long did you continue that meeting?

A. In the afternoon?

(Testimony of Chester McNair.)

Q. Yes.

A. Oh, an hour or two, perhaps two hours, say.

Q. Did you at that time see a telegram that Mr. Hill had with reference to his authority to conduct negotiations?

A. I believe I did. I believe Mr. Hill showed me a telegram he had received.

Q. There has been a telegram introduced in evidence as Defendant's Exhibit 6, will you look at it please and state whether or not that is the telegram Mr. Hill showed you with reference to his authority to conduct negotiations for the Gamble-Skogmo Company? A. Yes.

Q. Your answer is yes? A. Yes.

Q. And what was the subject of the conversations which you had on the afternoon of October 25th over in your office?

A. Well, I did question Mr. Hill as to whether he had authority to represent this company, not to represent them in negotiations but whether he had authority to make conclusive arrangements or deal or something of that sort and he assured me he did have and this telegram——

Q. Corroborated that? A. Yes.

Q. And in addition to your questioning him about his [293] authority and things of that character, did you go ahead then with reference to any matters concerning the lease of December 27, 1943, or any other lease or other matters?

A. We had nothing to do with the old former

(Testimony of Chester McNair.)

lease. We entered into tentative discussion and details of a proposed new lease.

Q. Well was there any further discussion with reference to reinstatement or renewal of the lease of December 27th, 1943?

A. Oh, no, that was taken for granted by me at least that had been terminated.

Q. Well, did he appear to question it?

A. He didn't appear to question it.

Q. In any of his discussions with you?

A. Not in his discussions with me. [294]

* * *

Q. Let me ask you this. Up to the point of coming to this minimum rental of \$12,000.00 or \$10,000.00 had there been an agreement between yourself and Mr. Hill with reference to the other terms of the new lease?

A. Every other detail had been ironed out.

Q. And agreed upon?

A. And agreed upon. [295]

* * *

(Question read): Q. Now what have you to say with reference to the item of the 2% on the farm sales of \$5,161.60?

Q. (By Mr. Hall): Was that discussed at any time during these conferences between yourself and Mr. Hill?

A. Not after the very initiation of them; it was not discussed after that.

Q. Well, what do I understand by that, that

(Testimony of Chester McNair.)

there was or was not an agreement reached between you and Mr. Hill with reference to the payment of \$5,161.60? A. That was agreed.

Q. And was that contingent upon your continuation of the old lease or a new lease by McNair Realty Company and Gamble-Skogmo? [296]

A. No, I told Mr. Hill that if that was contingent upon anything, we couldn't talk about anything further.

Q. In other words, the discussions were at an end?

A. The discussions would be at an end. So when he proceeded I took it for granted that was not, that no new lease that that was not contingent upon anything.

Q. So that your understanding of the matter then was that Gamble-Skogmo were to pay McNair Realty Company the sum of \$5,161.60 whether a new lease were negotiated or whether they left the premises? A. That is correct.

Q. Now, how long did Mr. Hill stay here engaged in these conferences with you?

A. Until Friday evening. I forget the date.

Q. It would be October 28th?

A. October 28th.

Q. Did he then leave Great Falls so far as you know? A. Yes.

Q. And do you know what his purpose in leaving Great Falls was?

A. To attend a meeting in Minneapolis.

Q. And for what purpose?

(Testimony of Chester McNair.)

A. To get the Company's consent to the minimum rental of \$12,000.00.

Q. That, I understand, was the only matter left between you?

A. That is my understanding. [297]

* * *

Q. What is the nature of the small warehouse that is located upon the lot on First Avenue North?

A. It's a brick and tile and concrete and wooden building. The dimensions are forty by fifty feet. It sets approximately ten feet in from the alley and has a large door which would admit a truck, for instance, and inside it has a wooden balcony running around part of the area which is used for, can be used for storage.

Q. What was the building used for prior to the time you purchased it?

A. Warehouse building. [298]

Q. Continuously since it was built?

A. So far as I know.

Q. I believe Pinsky owned it?

A. Pinsky originally owned it.

Q. And was it also used as a warehouse by Strain Bros.?

A. Yes.

Q. Do you know whether or not at any time the Gamble-Skogmo store used the building for a warehouse?

A. At the time we bought it it was occupied by Strains on a month-to-month warehouse tenancy. They vacated and Gambles immediately were given use of it.

(Testimony of Chester McNair.)

Q. And did they use it?

A. And did so use it.

Q. For storage purposes?

A. For storage purposes.

Q. And do you know whether or not furniture and tires and things of that sort had been stored in that premises for the period of time 1947 until 1949?

A. I know that merchandise of various sorts, of all kinds was stored there, yes. [299]

* * *

Cross-Examination

By Mr. Williams: [300]

* * *

Q. I am handing you Plaintiff's Exhibit 1 which purports to be a written lease dated December 27th, 1943, entered into between McNair Realty Company and Gamble-Skogmo, Inc., and I [301] point to paragraph 16 of that lease?

A. That is provision for termination.

Q. Yes. That provides that the lease may be terminated on certain contingencies happening, does it not? A. Yes.

Q. At your election or the election of the defendant? A. Yes.

Q. Now, I believe you stated that at the time you entered into this lease you expected it to run for the full period of ten years? A. Yes.

Q. Then am I to understand from that then that your expectation at that time was that the forfeiture

(Testimony of Chester McNair.)

clause would only be invoked as a security measure to insure the performance of the other provisions in the lease?

Mr. Hall: The termination clause you mean?

Mr. Williams: The termination clause; excuse me.

A. We didn't deal on our expectations of the termination.

Q. But you did expect that the lease would run ten years?

A. We expected the lease would be lived up to and run ten years. I could add to that a little if you would like to have me.

Q. Well, just a second. Now I ask you if—what was the purpose of the termination clause in the lease?

A. I don't know. This lease was furnished by Gamble-Skogmo.

Q. Then as far as you were concerned when you entered [302] into it you did not intend to use it, you had no intentions on the matter at all?

A. As of that date, no. [303]

* * *

Q. Mr. McNair, I believe you testified yesterday somewhat on percentage leases, is that correct?

A. Yes.

Q. I understand you have approximately eleven percentage leases in your office at the present time?

A. Yes.

Q. I think you testified that the purpose of en-

(Testimony of Chester McNair.)

tering into a percentage lease was to permit the landlord to share in the profits in good years and the landlord's profit would not be so much in bad years?

A. That is one of the general theories. [304]

Q. Was that the fundamental purpose in which you entered into this lease involved in this lawsuit?

Q. You mean was that the reason we made a percentage lease?

Q. Yes.

A. Why, yes, it was. If Gamble-Skogmo Company did a business commensurate with what they held out to us they would do, we stood to gain through percentage arrangement; if their business was disappointing, they only paid a minimum.

Q. As a matter of fact the prime reason the landlord enters into any lease is to obtain rent?

A. Usually so; he does not give his property away.

Q. And I suppose the primary purpose in entering into this lease was to obtain rent?

A. That was the primary purpose.

Q. Now in this particular lease involved in this lawsuit that rent was to be paid in part by a fixed annual payment payable monthly, the annual payment being \$5400.00, was it not? A. Yes.

Q. And the monthly payments were \$450.00?

A. That was part of the rent, the guarantee and the additional, yes.

(Testimony of Chester McNair.)

Q. And then the percentage was over and above that guaranteed minimum payments?

A. Yes. [305]

* * *

Q. Now, as I understand this case, you, as the President and the representative of the defendant, are contending that you are entitled to an accounting and rent on wholesale sales on these premises, do you not? A. I do.

Q. As a matter of fact the lease which is in evidence as Exhibit 1 provides that should lessee develop a general wholesale business on these premises, then 1% of such general wholesale sales will be paid to the lessor? A. 1%, yes.

Q. And that is upon in the event the lessee should develop a general wholesale business?

A. That is correct. [306]

Q. Have you ever been advised that there was no general wholesale business developed on those premises?

A. We have been advised verbally because we consistently asked for wholesale figures and were told that there were no wholesale figures on sales but we never had a written statement to that effect.

Q. Now, as I understand you, you have been advised only orally that there has never been a general wholesale business developed on these premises, is that correct?

A. Well, it is my recollection. There may be—I might be wrong.

Q. Now I am handing you Defendant's Exhibit

(Testimony of Chester McNair.)

No. 16 and I call your attention to a letter dated July 9th, 1946, which purports to come from Gamble-Skogmo, Inc., and is addressed to B. P. McNair Company. I further call your attention to the second paragraph of that statement on that letter and ask you if it does not say that there: "Regarding our percentage on general wholesale goods made on these premises there has been none as we have been operating Great Falls on strictly retail activity." Is that correct?

A. That is correct. We didn't go along with it but it is correct. I mean it is in that letter. There may be an answer to that. [307]

* * *

Q. In other words, you are not familiar then with the bookkeeping procedure of retail stores generally? A. I am very familiar with it.

Q. You are familiar with it? Do you understand then that—are you familiar with the bookkeeping system of the Gambles department store here in Great Falls?

A. No, we could never find that out.

Q. Now, as far as you know, the figures which show on their books as wholesale sales could be sales to employees or sales or transfers of merchandise to other Gamble stores as far as you know?

A. They could set their sales up in any fashion they liked. We don't know what those sales might be. We didn't know there were such sales until we dragged their books into court by subpoena.

(Testimony of Chester McNair.)

Q. Have you ever made any request upon the plaintiff that he pay an exact sum as the percentage rental due you on wholesale sales?

A. No, we have not for the reason—yes—not for an exact sum, no. [308]

* * *

Q. Now you state you have never made a request they pay an exact sum. Have you ever made a demand they pay an exact sum as a percentage rental on wholesale sales?

A. The only demand we made was for accounting on such sales so a sum could be determined to demand.

Q. Now have you ever requested access to the books and sales reports in the Great Falls Gambles department store to determine what those wholesale sales were? A. Never.

Q. Have you ever demanded access to those books and sales reports?

A. Not to the books. We demanded many times a report from the officers as to the amounts of those sales.

Q. But you have never made a demand to have access to the books themselves?

A. Yes, at the time they were subpoenaed that was a demand to see the books.

Q. And that subpoena was sometime after October 3rd, was it not?

A. October, yes, a little after October 3rd.

Q. This notice that the lease was terminated was

(Testimony of Chester McNair.)

signed [309] and served on October 3rd, 1949, was it not?

A. Yes, and it was because we could not get proper reports.

Q. But at the time then on October 3rd when you served a notice the lease was terminated you had never demanded actual access to the books and sales reports here in Great Falls?

A. At that time we were relying on the fact that we had been advised there were no wholesale sales. We didn't then know there had been \$88,000.00 worth of sales; that was later disclosed after we found these books.

The Court: Mr. McNair, would you answer the question and then if these other things must be brought out your attorney can bring them out.

A. What was the question.

(Question read): Q. But at the time then on October 3rd when you served a notice the lease was terminated you had never demanded actual access to the books and sales reports here in Great Falls?

The Court: Just answer it yes or no.

A. No.

The Court: Your attorney will take care of any other matter.

Mr. Williams: At this time, your Honor, I would like to move that portion of his previous answer which was not [310] responsive be stricken.

The Court: Well, it may go out; it is not a proper answer.

The Witness: Your Honor, if the court please.

(Testimony of Chester McNair.)

I am a prejudiced witness and I can't help it. I will try to follow.

The Court: No explanations necessary. You have a competent counsel here to take care of you.

Q. Have you ever started any legal proceedings prior to October 3rd, 1949, to determine the amount of the wholesale sales?

Mr. Hall: We object to this as immaterial.

The Court: Well, I don't know. You could answer the question.

A. Will you read the question?

(Question read): Q. Have you ever started any legal proceedings prior to October 3rd, 1949, to determine the amount of the wholesale sales?

A. No legal proceedings.

Q. Except for the one time when the books of the store were subpoenaed, which was approximately October 19th, 1949, did you ever demand an audit of those books by an accountant employed by you or a neutral accountant? A. No.

Q. Now during the years that Mr. Cockayne has been manager of this store you and he have been quite friendly, have you not? [311] A. Yes.

Q. You have spent some time down in the Gambles department store, I assume?

A. I have been there on two or three occasions, maybe three or four.

Q. In the two or three years he has been there you have been there on three or four occasions?

A. Possibly.

(Testimony of Chester McNair.)

Q. At those times when you were there did you ever ask Mr. Cockayne for any sales figures?

A. Only once.

Q. That was sometime in 1948, was it not?

A. Yes.

Q. And did Mr. Cockayne give you those sales figures? A. Yes, he did.

Q. Did he give you exact figures?

A. He gave me exact figures.

Q. Has Mr. Cockayne ever refused to give you any figures?

A. No, I never asked him but the once.

Q. Now at any time prior to the deposition of Mr. Cockayne were you able to obtain the exact figures as to the amount of farm sales made?

A. No.

Q. Did you ever make a demand or request to the plaintiff that he pay an exact figure on the farm sales during the year 1948?

A. Not an exact figure; we didn't know it. [312]

* * *

Q. Now you or the defendants subpoenaed the books of the plaintiff at the time the deposition of Dale Cockayne was taken in the Montana State District Court, did they not?

A. That is correct. [313]

Q. The defendant, Mr. Cockayne, furnished those books and sales reports? A. He did.

Q. His deposition was taken, was it not?

A. It was.

(Testimony of Chester McNair.)

Q. And those books and sales reports were turned over to the reporter who took the deposition, were they? A. They were.

Q. And after they were turned over to him it was understood between Mr. Hall and myself that both the plaintiff and the defendant would have access to those books, is that correct?

A. That is correct.

Q. Did the plaintiff have access to those books after that time?

A. The plaintiff had those books for a matter of several days until after Mr. Hill's return to Minneapolis and then at some later date in October the defendant had access and used those books.

Mr. Hall: You said Mr. Hall.

A. I meant Mr. Hill, excuse me.

Q. Now since the defendant has had access to the books has it ever made a demand upon the plaintiff for any exact figure claimed under wholesale sales?

A. We couldn't. This present action was filed before we had access to those books.

Mr. Williams: Your Honor, I ask that that [314] answer be stricken as not responsive to the question.

The Court: Yes, just answer the question.

The Witness: Read the question.

(Question read): Q. Now since the defendant has had access to the books has it ever made a demand upon the plaintiff for any exact figure claimed under wholesale sales?

(Testimony of Chester McNair.)

A. No, sir.

Q. Since the defendant has had access to the books has the defendant ever made a demand upon the plaintiff for the, an exact amount claimed under the sales of unit 5 or farm store sales items?

A. I don't know how to answer that. No.

Q. Now has there ever been a time during the duration of the lease when the defendant has demanded or requested an audit of the actual sales reports when it was refused?

A. You are speaking of audit now?

Q. I am speaking of audit now.

A. No audit has ever been refused.

Q. Has access to the books ever been refused since the beginning of this lease?

A. No. [315]

* * *

Q. I believe you testified on direct examination that the defendant had spent some money remodeling and repairing the premises in question, is that correct?

A. That the defendant had spent some money?

Q. Yes. A. That is correct.

Q. Most of those expenditures were made prior to occupancy by the plaintiff, were they not?

A. In 1943 when the negotiations were under way with Mr. Hoben it was well known to both of us that a new tenant required certain remodeling for his particular purposes. It was agreed between us at that time that the landlord would assume certain of the remodeling expense and the

(Testimony of Chester McNair.)

tenant would assume certain. Gamble Company expended in the neighborhood of \$3,000.00 by an arrangement and we expended a little over \$6,000.00 in those remodelings.

Q. And these expenditures were made pursuant to the terms of the lease, were they not? That is, this provision [316] in your lease you would make certain repairs and alterations?

A. That is right.

Q. And that is what your money was expended for? A. I presume it is in the lease.

Q. Now I suppose when a store is remodeled it is done for the primary reason to attract more customers for retail sales? A. That is right.

Q. And as a natural consequence if sales increase the rental increases after you get above the minimum?

A. If there is any excess developed.

Q. And of course at the termination of the lease these premises will ultimately revert to the defendant, will they not? A. I hope so. [317]

* * *

Whereupon said Plaintiff's Exhibit No. 18, offered [318] and received in evidence, is in words and figures as follows, to wit:

(Testimony of Chester McNair.)

PLAINTIFF'S EXHIBIT No. 18

C. S. McNair, W. Robt. Gilchrist, Manager; B. P. McNair.

Established 1893

B. P. McNair Company

Insurance in all lines

Real Estate, Loans and Rentals

First National Bank Building

Great Falls, Montana

September 18, 1945

Mr. Ken Watters

Gamble-Skogmo, Inc.,

700 Washington Avenue North

Minneapolis, Minnesota

Dear Ken:

We have arrived at a point where we can do something with the owner of the garage building across the alley from your Great Falls location.

He, however, wishes to make a long term lease and to participate in some fashion with us under a percentage of sales with a reasonable minimum guarantee.

The matter is going to be somewhat complicated as it will have to be a three-cornered deal and I would suggest that it better be handled by direct negotiation rather than by correspondence. Hope you or Mike can arrange [319] to be here shortly and if so please let us know in advance so we can have the owner in town as he travels a good deal.

We have now completed the purchase of the

(Testimony of Chester McNair.)

little warehouse property with the vacant front end, also across the alley from you and the tenant has moved out. It is now available at \$60.00 per month for your use, including both building and the vacant ground 50x100, fronting on First Avenue North. Since it is standing idle we would appreciate word from you on this at once. It can be leased for any term you like but would be a separate deal and not tied in with your other.

Please write us by return air mail on these various points. Best regards to yourself and Mike.

Yours sincerely,

B. P. McNAIR COMPANY.

/s/ By C. S. McNAIR.

ew/

Air mail.

Q. (By Mr. Williams): Now are those premises containing that warehouse and the vacant lot on First Avenue North, are they still leased by virtue of an oral lease?

A. Yes, month to month tenancy. I don't know what you call lease. It is difficult. [320]

* * *

Mr. Williams: We offer in evidence Plaintiff's Exhibit 19.

Mr. Hall: No objection.

The Court: It may be received in evidence.

Whereupon said Plaintiff's Exhibit No. 19, of-

(Testimony of Chester McNair.)

ferred and received in evidence, is in words and figures as follows, to wit:

PLAINTIFF'S EXHIBIT No. 19

C. S. McNair, W. Robt. Gilchrist, Manager; B. P. McNair.

B. P. McNair Company

Established 1893 [321]

Insurance in all lines

Real Estate, Loans and Rentals

First National Bank Building

Phone 2-1094

Great Falls, Montana

May 28, 1946

Mr. Mike F. Hoben

Real Estate Department

Gamble-Skogmo, Inc.,

15 North Eighth Street,

Minneapolis 3, Minnesota.

Dear Mike:

Your undated letter of approximately April 8, to the attention of my brother and enclosing separate lease forms for Lot 5, Block 316, Great Falls, together with small warehouse building thereon at the rate of \$60.00 per month, has gone unanswered for the reason that I have been in the hospital in Missoula and my brother was awaiting my return.

We note your remarks as to the "unreasonableness" of this flat lease. The fact is, however, that this is at total variance with our verbal understanding had with Ken Watters at the time he and

(Testimony of Chester McNair.)

your construction engineer, Mr. Hill, were first in Great Falls together, and inspected the ground in question. It was through Mr. Watters' recommendation that we bought this property, thinking, of course, that it would benefit your operation here and in the long run, ourselves.

This understanding was as follows: If we could acquire [322] the lot in question and/or the two-story brick building at the corner of the same block, that either of them or both would be added to the lease schedule on the original premises with an increased minimum annual rental guarantee and the same percentage of sales.

If you will recall, we had dragged out negotiations for over a year on the corner building, pending a commitment from yourselves, which we were never able to obtain. The owner finally became disgusted and made other disposition of his building.

We did, however, buy the lot in question for your program. I am sure that if you will discuss the matter with Ken and Mr. Hill, they will each recall the circumstances of our verbal understanding prior to the purchase of this ground. This also was further covered in letters from my brother under dates of December 4, 1945, and January 31, 1946. It took your office something over two months to reply to the January 31 letter and then the form enclosed for our signature differed entirely from our understanding.

If you wish to prepare a new lease, and without

(Testimony of Chester McNair.)

delay, covering both properties, increasing the minimum by the \$60.00 per month and including all sales, whether from the original store premises, the vacant ground or the warehouse building, under the percentage agreement, we will still stick with our original understanding. This would be in your favor, as you [323] consistently report sales at less than your minimum and would thereby allow you a slack of an additional \$720 per year to build up to before any excess becomes effective.

As the matter now stands, this letter serves as notice that you have the warehouse lot and vacant ground on a month to month basis only and that upon due notice, we may sell or make other disposition of the property in question.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR. [324]

Q. And that signature is B. P. McNair Company by C. S. McNair, is it not?

A. That is correct.

Mr. Williams: We offer in evidence Plaintiff's Exhibit No. 20.

Mr. Hall: No objection.

The Court: It may be received in evidence.

(Testimony of Chester McNair.)

Whereupon said Plaintiff's Exhibit No. 20, offered and received in evidence, is in words and figures as follows, to wit:

PLAINTIFF'S EXHIBIT No. 20

B. P. McNair Company

Established 1893

Real Estate—Insurance

Great Falls, Montana

June 8, 1948

C. S. McNair,
B. P. McNair, Jr.,
Gamble-Skogmo, Inc.,
15 North Eighth Street,
Minneapolis 3, Minn.

Attention: Real Estate Department

Dear Sirs:

This is to advise you that beginning August first next, the rental on the warehouse property together with the vacant ground adjoining, all being Lot 5, Block 316, Great Falls, Montana, is hereby increased to \$90.00, instead of \$60.00 monthly as heretofore.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR.

CSMcN:hc

c.c. Mr. Dale Cockayne, Mgr.

Gamble Store,

Great Falls, Montana.

(Testimony of Chester McNair.)

Q. (By Mr. Williams): Have there been any changes in the, any written notification of rental terms of that warehouse or those premises since the letter which has been introduced in evidence as Plaintiff's Exhibit 20?

A. Been any change in what?

Q. Has there been any written notification of change [326] in the terms of that lease?

A. No.

The Court: I think probably the reporter would like a rest at this time. We will take a recess.

(11:10 a.m.)

(Court resumed, pursuant to recess, at 11:20 o'clock a.m., at which time the parties and all counsel were present.)

The Court: Proceed.

CHESTER McNAIR

resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Williams:

Q. Mr. McNair, I hand you this letter marked Plaintiff's Exhibit 21, which purports to be a letter from Gamble-Skogmo, Inc., to McNair Realty Company, which is undated, although it contains a pencil marking "4/8/46" with a question mark.

A. That is my writing.

(Testimony of Chester McNair.)

Q. And bears the signature Mike F. Hoben. Is the pencil writing "4/8/46" your writing?

A. Yes.

Q. And did you receive this letter from Gamble-Skogmo, Inc.? A. Yes.

Q. Did you receive it in the normal course of mail? A. Yes.

Q. And this letter has something to do with the leasing [327] of the warehouse, has it not?

A. Yes. It is addressed to my brother, Ben, but I can identify it.

Mr. Williams: We offer in evidence Plaintiff's Exhibit No. 21.

Mr. Hall: No objection.

The Court: It may be received.

(Whereupon said Plaintiff's Exhibit No. 21, offered and received in evidence, is in words and figures as follows, to wit:)

PLAINTIFF'S EXHIBIT No. 21

Gamble-Skogmo, Inc.,
Operating Gamble Stores
15 North Eighth Street
Minneapolis 3, Minnesota
Main 0281

4/8/46? (Pencil writing.)

McNair Realty Co.

Great Falls, Mont.

Attention: B. P. McNair.

Dear Ben:

We are enclosing a corrected lease proposal on

(Testimony of Chester McNair.)

the warehouse property in Great Falls as you requested, and trust that it will be satisfactory.

The only item different than your suggestion is the one regarding a percentage on sales in the warehouse and lot, and our Merchandising Department objects very strenuously to [328] this. I also feel that it is an item differing entirely from our original program and really not applicable in this case. I feel that you and Chet will see the reasonableness of this.

Thanking you and with kindest regards to each of you.

Sincerely yours,

GAMBLE-SKOGMO, INC.,

/s/ MIKE F. HOBEN,

Real Estate Department.

(Pencil notation.)

Unsatisfactory—not in accord with understanding
—no answer.

Q. I believe there has been some testimony in this trial that there were some repairs and improvements made on [329] the Gamble department store premises during the year 1946?

A. Yes.

Q. There were such repairs and improvements made, were there not?

A. I wouldn't say repairs; there were improvements on——

Q. On arches?

A. On arches, yes.

(Testimony of Chester McNair.)

Q. And as the owner of the building the defendant knew of these before they were made, did they not?

A. Yes, the plaintiff asked our consent and asked us to participate.

Q. And prior to the time that the store was remodeled; would remodeling be a correct term to use on what took place at that time?

A. Yes.

Q. Prior to the time the store was remodeled I believe the reports show that there was less than \$270,000.00 net retail sales?

A. That is correct.

Q. At any rate you did not receive any percentage rental for the first two lease years, did you?

A. That is correct, excess rental. We received the minimum rental guaranteed.

Q. And I suppose part of the purpose of putting in these repairs in doing this remodeling was to increase the volume of sales?

A. Oh, unquestionably.

Q. And when the remodeling was done did the volume of sales increase as far as you know? [330]

A. I believe they did increase.

Q. At any rate you received more rental thereafter?

A. That is correct.

Q. In fact you received some percentage rental after this remodeling was done, isn't that right?

A. That is correct.

(Testimony of Chester McNair.)

Q. Now when the remodeling was done did you encourage that remodeling or discourage it?

A. I dare say we encouraged it.

Q. What was the reason for your encouragement?

A. In the hopes that a satisfactory sales volume would be achieved.

Q. It was your belief, was it not, that the remodeling would increase the sales volume and consequently increase your rental?

A. That is correct.

Q. Now I believe you just stated that you had up until 1946 at any rate you had always received the minimum rental, is that correct?

A. Up until 1946 you mean for 1944 and 1945?

Q. Yes. A. Yes.

Q. In other words, the rental on the lease in question is paid in two ways, then, is it not?

A. It is.

Q. Part of that is the percentage and the other part is the guaranteed minimum, is that correct?

A. That is correct. [331]

Q. What is that guaranteed minimum annually?

A. \$5,400.00.

Q. And how is it paid?

A. Monthly in advance. That is, one-twelfth of the annual amount monthly in advance.

Q. Now as I understand your contentions and the contentions of the defendant there has been no objection made at least as to these monthly payments? A. None.

(Testimony of Chester McNair.)

Q. And they have come in from month to month in advance?

A. Very promptly and satisfactorily.

Q. Was there a letter of transmittal with those monthly checks?

A. There may have been occasionally; usually I think not. They just came in the mail in an envelope with no letter.

Q. How were those checks dated; they were dated, were they not?

Mr. Hall: You mean what date did they bear?

Q. Yes.

A. I think they bore usually, I think they bore the date of the current month, first day and received approximately on that day.

Q. At any rate they were normally dated somewhere near the first of the month, is that correct, of the month they were to pay rent?

A. Yes. [332]

Q. And did they contain on them the designation "rent check"?

A. I believe they did, but there was one thing they didn't contain as rent for what or when or where.

Q. But in the normal course of these five years in which you received them they were paid on or near the first of the month and they were rent for the premises involved in this lease, were they not?

A. Why yes.

Q. What was your answer?

A. Yes.

Q. And they, did they bear the name of the plaintiff on the check?

(Testimony of Chester McNair.)

Mr. Hall: May it please the court, we raise no question in this case and I don't believe there is any issue with reference to the payment of this monthly minimum down to the month of November, 1949. There is no question raised about it. If counsel wants such a stipulation, we will gladly give it to him.

Mr. Williams: My purpose is not that, your Honor. Of course, one of the issues in this case is full performance on the part of the plaintiff and if I may continue I will——

The Court: Go ahead.

Q. Now after you received these checks they were normally deposited in the bank, were they not?

A. Oh, yes, the day they were received. [333]

Q. And on the back——

A. Well we have dealt with different banks and it might have been anyone of several.

Q. What bank have you used during the year 1949? A. McNair Realty Company?

Q. Yes. A. Two banks.

Q. What are those two?

A. One is the Montana Bank and Trust and one is the First National Bank of Lewistown.

Q. Of Lewistown? A. Yes.

Q. Do you normally deposit that check in the Lewistown bank?

A. Not normally. It probably would go into the Great Falls Montana Bank and Trust.

(Testimony of Chester McNair.)

Q. And I assume you used a deposit slip when you deposited it?

A. That I couldn't say. The Cashier—the book-keeper takes care of that.

Q. Did you sign these checks or use a stamp?

A. Oh, they would be rubber stamped.

Q. And would there be any record in your office as to these payments?

A. Oh, yes, they would be credited to the proper account. [334]

Q. Now did you receive a check for the rent for October of 1949?

A. I can't say. I presume so.

Q. But you don't know? A. No.

Q. Do you have your records available?

A. I have. My counsel has.

* * *

Q. I believe these are your store records, are they not, Mr. McNair, or your office records?

A. Yes, that was prepared in our office.

Q. And do those records show that the rent check for the month of October, 1949, was received?

A. Yes.

Q. Does it show whether or not that check was cashed?

A. No, it doesn't, but I would take it from this that [335] it came into our office and was deposited on October 3rd, the morning of October 3rd.

Q. As far as those records?

A. As far as these records disclose. I don't personally deposit it or cash it.

(Testimony of Chester McNair.)

Q. There is a possibility those records could be incorrect? A. There is.

Q. I hand you this document marked Plaintiff's Exhibit 22, which purports to be a check from Gamble-Skogmo, Inc., on the left side it bears the words "date of check," and the figures 10, then a space 03 and then a space 9. It is made payable to McNair Realty Company, Great Falls, Montana, and is in the amount of \$450.00. In the upper righthand corner it says "rent check." Does that appear to be one of the regular rent checks you have received from the plaintiff? A. Yes.

Q. And this is comparable to the checks which you have received monthly from the plaintiff, is it not?

A. As far as I recall. I think it is exactly similar.

Q. And on the back this check contains an endorsement, does it not, which is a stamp "Pay to the order of the Montana Bank and Trust Co." and bears also the signature McNair Realty Company, B. P. McNair Company by B. P. McNair?

A. Not signature, just——

Q. The rubber stamp?

A. With rubber stamp. [336]

Q. Is that the stamp generally used in your office?

A. I haven't examined it. I think so.

Mr. Williams: We offer in evidence Plaintiff's Exhibit No. 2.

Mr. Hall: No objection.

(Testimony of Chester McNair.)

The Court: Received in evidence.

(Whereupon said Plaintiff's Exhibit No. 22, offered and received in evidence, is in words and figures as follows, to wit:)

PLAINTIFF'S EXHIBIT No. 22

Gamble-Skogmo, Inc.
Operating Gamble Stores
Minneapolis, Minnesota

Rent Check G 143A

Date of check

Mo. Day Yr.

10 03 49 12821

No. 22901

McNair Realty Company
Great Falls, Montana

Amount
450.00

Northwestern National Bank of Mpls.
Payable Only at Main Office
17-1 Minneapolis, Minnesota 17-1

/s/ ?

G/S GAMBLE SKOGMO,
INC.

A.C.N.

(Testimony of Chester McNair.)

(Reverse side.)

Pay to the order of
Montana Bank and Trust Co.
482 Great Falls, Montana 482
McNair Realty Company
B. P. McNair Company
B. P. McNair
Oct. 7, 1949 [337]

Pay to the Order of
Any Bank or Federal Reserve Bank
Prior Endorsements Guaranteed
American National Bank
St. Paul, Minnesota
22-7

The American National Bank
St. Paul, Minn.

Pay to the order of
Any Bank, Banker or Trust Co.
Or through the Local Clearing House
Oct. 5, 49, 85 59
Prior Endorsements Guaranteed
Montana Bank and Trust Co.
Great Falls,
93-518 Montana 93-518

Q. (By Mr. Williams): Was this check in question deposited in the bank so far as you know?

A. So far as I know.

Q. And was it ultimately paid?

A. So far as I know.

(Testimony of Chester McNair.)

Q. The bank has never made a demand on you since the date it was deposited to return the money?

A. I think it was honored at the other end.

Q. Did you ever make an objection to the receiving of the October rent? Did you ever make an objection to receiving this check which is Plaintiff's Exhibit 22? [338]

A. No.

Q. After you deposited that check did you ever return the \$450.00? A. No.

Q. You did receive monthly rent checks comparable to Plaintiff's Exhibit 22 for the month of November and December, did you not?

A. Yes. [339]

Q. Have you at any time during the course of the lease involved in this lawsuit ever given the plaintiff a written notice to pay rent or vacate the premises?

Mr. Hall: What do you mean, three-day notice under [340] the statute?

Mr. Williams: I am merely asking him if he ever gave them written notice to pay rent or vacate the premises in the alternative?

Witness: That may have been contained in a notice that we gave them.

Q. You don't know whether it was or was not?

A. Without refreshing myself I wouldn't be too sure.

Q. If you did give such a notice, would you know whether or not it specified the exact amount of the rent claimed?

(Testimony of Chester McNair.)

A. I doubt if it did. We didn't know the exact amount.

Q. Now in the event the plaintiff makes a payment of any back rent which has been claimed by the defendant together with interest and court costs, are there any further damages which the defendant has suffered?

A. In what connection; damages of what nature?

Q. Well as I understand it your contention is, the defendant's contention is that there has been non-payment of rent?

A. That is one of the contentions.

Q. And that—what are the other contentions?

A. That we could not get a statement of the business done on the premises.

Q. Now if you obtained a complete audit or accounting of the sales on the premises made by your own auditor or [341] accountant and received all back rent which that auditing or accounting showed, would there be any other damages which the defendant has suffered?

A. That would have to be gone into and an examination made of the physical condition of the building and that has not been done.

Q. So far as you know the physical condition of the building has not been damaged, has it?

A. Oh, it's been. Yes, there's been a partition taken out upstairs and in the basement. There was a large portion of the concrete floor on the first floor chopped out so as to provide a stairway

(Testimony of Chester McNair.)

for the public down into the basement, another tenant or tenancy might require all of those things replaced. That would be a matter that would take a little consideration.

Q. But you are not making any claim at this time?

A. At this moment I don't know whether there would be a further claim from that standpoint or not.

Q. Are you making a claim for any other damages, other contentions?

A. We haven't made any claim for any damages. [342]

* * *

Mr. Williams: If the court please, in order to save some time in this case the counsel for the plaintiff and counsel for defendant have entered into a stipulation that the check which is in evidence as Plaintiff's Exhibit 22 was deposited in the Montana Bank and Trust Company on October 5th, 1949.

The Court: Very well.

Mr. Williams: And we have also entered into a stipulation that the original bank deposit of the Montana Bank and Trust Company showing this deposit of the check which is Plaintiff's Exhibit No. 22 may be received in evidence.

The Court: Very well, it may be received in evidence.

Mr. Williams: At this time we offer in evidence Plaintiff's Exhibit 24.

(Testimony of Chester McNair.)

Mr. Hall: I have already agreed it may be admitted.

The Court: It may be received in [343] evidence.

(Whereupon said Plaintiff's Exhibit No. 24, offered and received in evidence, is in words and figures as follows, to wit:)

PLAINTIFF'S EXHIBIT No. 24

Deposited with Montana Bank and Trust Co.
Great Falls, Montana Oct. 5, 1949

McNair Realty Co.

Please list each check separately

Currency 222.00

Silver

Checks as follows:

Coast to Coast 303.00

Gambles 450.00

J. J. Newberry 900.00

Buttreys 253.00

Oct. 5 2,128.00 D4

39

Original Total 2,128.00

See that all checks and drafts are endorsed

Q. (By Mr. Williams): Mr. McNair, I believe that after the conference in Mr. Hall's office on October 25th, 1949, you and Mr. Hill entered into a series of negotiations by yourselves, did you not?

A. That is right.

(Testimony of Chester McNair.)

Q. And then after some negotiation between you and Mr. Hill there was another meeting in Mr. Hall's office, was there not?

A. I believe so.

Q. What was the date of that meeting?

A. Wouldn't that be the following day; wouldn't it be the 26th? I am not positive as to that.

Q. I believe the testimony here is that it was October 27th at ten o'clock a.m. Does that sound reasonable to you and correct?

A. That sounds reasonable.

Q. Now who was present in that conference?

A. I am trying to remember whether Mr. Cockayne was there. The others were, Mr. Hill and yourself and Mr. Hall and myself.

Q. You don't remember whether Mr. Cockayne was there or not? A. I am not too sure.

Q. As that conference opened the plaintiff made another offer, did it not?

A. Could you refresh me on the terms.

Q. Well as a matter of fact the offer was made by me, was it not? [345]

A. If I recall what offer—you see there was so much conversation at different days.

A. Very well, did I at that time make an offer on behalf of the plaintiff to pay 2% on all past sales of farm store items, plus 2% on all future sales of farm store items during the life of the lease dated December 27th, 1943; do you remember those offers? A. Was there any further?

Q. Yes, there was further. There is more to

(Testimony of Chester McNair.)

the offer than that. Do you remember those parts of it?

A. If you put the whole text together.

Q. Up to now you don't remember my making that part?

A. I am rather hazy as to what took place on a given day in a given room.

Q. Do you remember in that particular conference my having a yellow pad in front of me and stating that we were prepared to make a second offer of any kind?

A. Yes, I believe I do. I don't know about the yellow pad.

Q. You don't remember what the offer was?

A. No, I don't remember what the offer was.

Q. Do you remember whether or not that offer was accepted?

A. To the best of my recollection no offer was accepted as tying in those various things you speak of because there [346] was no need of it.

Q. Do you remember whether or not as part of that offer I stated that if accepted it was to be contingent upon the old lease remaining in effect and a full settlement of all claims?

A. I remember conversation of that effect and it is my understanding that we made it plain the old lease was a dead issue.

Q. Then my offer did contain the provision that the old lease must remain in effect and that offer was refused?

A. Oh, it would have to be, yes.

(Testimony of Chester McNair.)

Q. At that time do you remember did anybody representing the plaintiff admit the liability for the 2% on past farm sales in a sum of approximately \$5,161.60?

A. I couldn't quote words but it was my understanding that that money was owed and the—it was tacitly acknowledged by virtue of the fact that we were even talking about a new lease.

Q. Do you remember any words that I or any Gamble representative used in which we admitted that we owed the sum of—for past farm rental on farm sales?

A. I couldn't quote exact conversation.

Q. But it was understood by you that we did admit that we owed that amount of money?

A. Yes, and it was so understood. [347]

Q. There is no question in your mind that we offered to pay that amount of money, is there?

A. No, you offered to pay the money.

Q. Is there any question in your mind that our offer to pay was contingent upon the old lease remaining in effect?

A. The offer of half payment and contingency of re-establishing the old lease was refused.

Q. And that was the first offer?

A. That was the first offer.

Q. Now the offer of full amount paid and the old lease remaining in effect was that accepted or refused?

A. It was refused so long as it contained the contingent about the old lease.

(Testimony of Chester McNair.)

Q. Now in the conference I am talking about on October 27th was there any admission by myself or any of plaintiff's representatives that the old lease was terminated?

A. Excepting only tacit admission.

Q. Can you recall who made the tacit admissions?

A. Well the fact that you people were talking a new lease was premised upon the assumption the old lease was an old issue and the money owed and would be paid.

Q. But you can't remember which if any representative made that tacit admission?

A. No, I think that I made the condition quite clear.

Q. Was there any admission by anybody in that conference [348] as to when, that is, any admission by any of the representatives of the plaintiff as to when the premises would be vacated?

A. No.

Q. Then it was your understanding that the plaintiff admitted that the lease was terminated but not that it would surrender possession, is that correct?

A. No, you see—that is correct.

Q. Now subsequent—now did you accept that figure of—I believe you stated you did not accept that figure of \$5,161.60 as made in an offer which involved the old lease remaining in effect?

A. You mean accept the figure as being—

Q. No, did you accept the offer as such? I

(Testimony of Chester McNair.)

believe you just testified you did not accept it as such? A. The figure was acceptable.

Q. You did accept the figure, did you not?

A. By figure do you mean the cash book or being the correct amount in dispute or what?

Q. Well what I want to know is first of all I believe you already testified you did not accept the offer on the part of the plaintiff to pay that amount of money if it meant the old lease was to remain in effect? A. Correct.

Q. But you would accept the figure as being substantially correct?

A. As being substantially correct. [349]

Q. As a matter of fact part of that offer was to pay whatever figure the record showed as being correct?

A. Yes, insofar as farm sales were concerned. That would not include wholesale sales.

Q. Now as I understand it it was your tacit understanding that we agreed to pay that sum of \$5,161.60? A. That is correct.

Q. And you were willing to accept that payment, were you not?

A. Yes, with no strings attached. [350]

* * *

Q. During this period of negotiation at any time in my presence was there an admission on behalf of the plaintiff that the old lease was terminated? A. Yes. [351]

* * *

(Testimony of Chester McNair.)

Redirect Examination

By Mr. Hall:

Q. Now do I understand, Mr. McNair, at no time during the conferences held between you and Mr. Hill that there was any agreement on his part to pay this \$5,161.60?

A. He agreed to pay that.

Q. Well was that an actual agreement to pay or was it a tacit agreement to pay, something you understood?

A. I know that was agreed to be paid.

Q. And was that amount accepted by you in settlement of the percentage rentals upon the farm sales?

A. Yes.

Q. For the period 1947, 1948 and 1949 down to October 19th?

A. Yes.

Q. Now during your cross-examination you were asked whether or not you made any demands upon the plaintiff with reference to the percentage claimed due on wholesale sales and I believe you said you had made no such demand?

A. For a fixed figure.

Q. That is right?

A. No.

Q. And why was no such demand made?

A. Because we had no way of fixing a figure. We made demands but not for a fixed figure.

Q. The store records did not become available until sometime after November 1st, did they, so far as you are [352] concerned?

A. That is correct.

(Testimony of Chester McNair.)

Q. From the office of Mr. Silk, the Notary Public, who took Mr. Cockayne's deposition they were sent back down to the Gamble store?

A. That is right.

Q. At the request of Mr. Cockayne for store purposes?

A. That is right.

Q. And on November 1st the present action was filed, was it not?

A. Yes.

* * *

Q. State whether or not that was the reason you made no such demand; that is, the reasons you have just given?

A. Yes, we couldn't make a demand in a fixed figure.

Q. Now in reference to the question propounded to you by counsel for the plaintiff with reference to a demand for the amount due as a percentage on sales from unit 5 I believe [353] you told counsel that you had made no such demand for any fixed amount?

A. Not for any fixed amount.

Q. And why didn't you make it?

A. For the same reason, we had no access to figures to set a fixed figure.

Q. And that would be true up until you had received a figure, would it not?

A. That is true.

Q. And after you had received a figure was there any reason why you did not make a demand?

A. There was no necessity for demanding then.

Q. Why was not there necessity for demand?

(Testimony of Chester McNair.)

A. The figure was agreed on between the plaintiff and ourselves as correct.

Q. I assume that you mean between plaintiff—you mean Mr. Hill, do you not?

A. Mr. Hill, that is right. [354]

* * *

Q. I show you a letter which has been marked for identification proposed Defendant's Exhibit 26 and ask you to state whether or not your signature appears upon the bottom of that letter?

A. Yes, that is my letter.

Mr. Hall: This letter, may it please the court, was produced at my request by Mr. Williams from the files I assume of Gamble-Skogmo, Inc.

Mr. Williams: That is correct.

Mr. Hall: We offer in evidence Defendant's Exhibit 26 for the defendant.

Mr. Williams: No objection.

The Court: Very well, it may be received in evidence.

(Whereupon said Defendant's Exhibit No. 26, offered and received in evidence, is in words and figures as follows, to wit:)

(Testimony of Chester McNair.)

DEFENDANT'S EXHIBIT No. 26

B. P. McNair Company
Established 1893
Real Estate—Insurance
Great Falls, Montana

March 30, 1949

C. S. McNair
B. P. McNair, Jr.
Gamble-Skogmo, Inc.,
15 North 8th Street [355]
Minneapolis 3, Minnesota.

Attention: Mr. William T. Hill
Real Estate Department

Dear Sirs:

This will acknowledge your two letters of December 30, 1948, and March 25, 1949, enclosing checks for \$2,862.07 and \$2,017.30, respectively.

These letters purport to be sales reports for certain quarterly periods. As letters they are interesting but they scarcely constitute reports such as we are entitled to.

Furthermore, the total figures contained therein are extremely disappointing. We still have to point out to you that no report is made as to so-called farm sales and that if such figures have been included in the totals given in your letters then these totals are increasingly disappointing.

We are crediting your account with the checks in question as being simply payments on account.

As we have done before, we here and now make

(Testimony of Chester McNair.)

formal demand upon you for fully certified sales statements, and for the additional sums due as shown by such statements.

If these are not forthcoming, properly made up, showing your sales by departments for the periods in question, on or before May 1st, next, we will turn the matter over to our attorneys with instructions to them to ask the courts to terminate your lease. [356]

Very truly yours,

McNAIR REALTY COMPANY.

Recross-Examination

By Mr. Williams:

Q. You have just stated that you obtained the figure of \$88,000 as the approximate amount of the total wholesales; that figure was obtained from the books of the Gamble-Skogmo Company, was it not? A. These books, yes. [358]

A. And by these books you are pointing to the books that are the sales records of the Gamble department store? A. Yes.

Mr. Hall: I think we call those store records; at least what I have been calling them.

Mr. Williams: Very well.

Q. Now I believe you testified once before that you are not familiar with the bookkeeping setup of the Great Falls Gambles department store, is that correct? A. That is correct.

(Testimony of Chester McNair.)

Q. And these wholesale sales as far as you know could be wholesale sales to employees, could they not?

A. There is a space there for sales to employees and these were in a space marked wholesale sales.

Q. The space marked—I will hand you these books which you purported to take this figure from, and do you see any place that states sales to employees?

A. This provides for employees discount.

Q. There is a figure there for provision for employees discount, isn't there?

A. There is.

Q. Is there any figure which provides for sales to employees or any account of sales to employees?

A. It was explained to us by——

Q. Just answer the question.

A. Well I can't see it. I can't see it. [359]

Q. Now it is possible, is it not, that an employees discount does not amount to the full value of the merchandise? A. That is correct.

Q. In other words, Gambles is not giving their merchandise to their employees?

A. That is correct.

Q. And as far as you know the figure which would be the employees discount would be a percentage of the total purchase price to the employer?

A. Well I don't know their methods. I don't know what it would be.

Q. Now do these figures and these books from which you purported to take the total figure for

(Testimony of Chester McNair.)

wholesale sales, does that show any sales or transfers to other Gambles stores?

A. I don't know. As a matter of fact I didn't take those figures myself.

Q. Well you have these books in front of you, which are the store records, do you see any figure there which purports to be sales or transfers to other Gambles stores? A. No.

Q. Then so far as you know the figure shown on these store records as wholesale sales could be sales or transfers of merchandise to other Gambles stores? A. It could be sales to anybody.

Q. That item of sales and transfers of merchandise to other Gambles stores is not shown elsewhere in these records, [360] is it?

A. Well—which?

Q. The items of sales and transfers to other Gambles stores?

A. Well I haven't seen it, no.

Q. Now I believe you testified a few minutes ago that you told your brother that you had entered into a new lease and you gave him the details of the same, is that correct?

A. Details of the lease.

Q. Yes. Is it your contention and was it your understanding at that time that the new lease had been negotiated?

A. It was my understanding subject to one provision which was to get confirmation.

Q. And that provision was one which could amount to the sum of \$3,000.00 a year, could it not?

(Testimony of Chester McNair.)

A. Yes.

Q. That provision was as to whether the minimum rental payments on a yearly basis would be \$15,000.00 per year or \$12,000.00 per year?

A. No, that provision was whether the minimum rental would be \$12,000.00 a year or some lesser figure; whether \$12,000.00 a year would be acceptable to Gamble-Skogmo.

Q. At any rate the figure of \$12,000.00 a year had not been settled upon?

A. That figure was subject to confirmation by Minneapolis; it had been accepted by Mr. [361] Hill.

* * *

Q. I believe you stated a few minutes ago that there was an agreement on behalf of the plaintiff to pay the defendant the sum of \$5,161.60; you stated that that was more than a tacit agreement, it was an actual agreement?

A. That was my understanding. [362]

Q. When was that figure accepted, that offer to pay accepted by you?

A. It was understood between us that we wouldn't talk about a new lease until that was cleared up.

Q. Then that figure was accepted by you before there was any talk about a lease?

A. My understanding.

Q. At any rate it was accepted by you prior to October 27th, 1949, was it not? A. Yes.

(Testimony of Chester McNair.)

Q. At any time on the date of October 27th, 1949, did you refuse to accept that figure?

A. Only unless it had strings.

Q. Only what?

A. Only in case it had strings attached. [363]

* * *

BEN P. McNAIR, JR.

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hall: [364]

* * *

Q. Now from time to time have you had occasion to go into the Gamble store here in Great Falls? A. Yes.

Q. During the period of the December 27th, 1943, lease? A. Yes.

Q. What about how many occasion have you been in there?

A. I have been there several times a year.

Q. I am not trying to pin you down to any particular number, and upon any of those occasions did you see any farm machinery being displayed in the Gamble store? A. Yes.

Q. And what sort of farm machinery was being displayed?

A. I saw at one time a tractor. [365]

* * *

(Testimony of Ben P. McNair, Jr.)

Mr. Williams: We offer in evidence Plaintiff's Exhibit 17.

Mr. Hall: No objection.

The Court: It may be received in evidence.

(Whereupon said Plaintiff's Exhibit No. 17, offered and received in evidence, is in words and figures as follows, to wit:) [366]

PLAINTIFF'S EXHIBIT No. 17

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager

Established 1893

B P. McNair Company

Insurance in All Lines

Real Estate, Loans and Rentals

First National Bank Building

Phone 2-1094

Great Falls, Montana

September 6, 1945

Gamble-Skogmo, Inc.

700 Washington Avenue North,

Minneapolis, Minnesota.

Attention: Mr. Ken Watters.

Dear Ken:

This week completed the deal whereby we purchased the lot and warehouse in back of the property you people rent from us. The warehouse is vacant and is now available for you to occupy. It is my understanding that you and Chester agreed

(Testimony of Ben P. McNair, Jr.)

on a \$60.00 per month rental. This would be an entirely separate rent deal than the rent on the store.

I went over to see your manager the other day to tell him he could occupy the warehouse and he was not in so I talked with the assistant manager who said he [367] had no authority to take over the warehouse although he knew Gambles wanted it. Will you please instruct your Great Falls manager that he may occupy the premises.

Some time ago we submitted several proposals to Mr. Peters for the garage building and to date we have not heard from him although he said he would definitely be interested in one of the deals we proposed.

The Tent and Awning Company who occupy the store on the alley are very insistent that we give them another lease, however, we are stalling them and we would like to know definitely from you if you want the premises now occupied by them, the shoe repair shop and also the garage building.

With best personal regards to all the boys at Gambles from Chester and myself.

Sincerely,

B. P. McNAIR COMPANY,

By /s/ BEN,

B. P. McNAIR.

Mr. Williams: That is all.

Mr. Hall: That is all. [368]

S. L. HJERMSTAD

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hall:

Q. Your name is S. L. Hjermstad?

A. That is right.

Q. And you are in the insurance business here in Great Falls, are you not? A. Yes, sir.

Q. And how long have you lived here?

A. I took charge of this territory February 1st, 1944.

Q. And have you lived here since?

A. Yes.

Q. Were you living here in the year 1947?

A. Yes.

Q. Are you acquainted with the location of the Gambles store on Central Avenue? A. I am.

Q. At 521, 523, 525? A. I am.

Q. That is its present location? A. Yes.

Q. Have you had occasion to go into the Gamble store in 1945, 1947, 1948 and 1949?

A. Yes, sir.

Q. And for what purpose?

A. To check the insurance rates for the engineering department of the companies carrying that schedule.

Q. What insurance company do you represent?

(Testimony of S.L. Hjermstad.)

A. Well, I am State Agent for the American Four Group.

Q. Yes, that is several insurance companies?

A. Yes, several insurance companies and one casualty [369] company.

Q. Now on occasion when you were in the Gambles store did you see any farm machinery displayed there?

A. I saw a tractor the last inspection or next to the last.

Q. And what year would that be?

A. If I remember correctly that was in 1947.

Q. And in what part of the store was it displayed?

A. About in the center of the main floor as you come in.

Q. That is the street floor? A. Yes.

Q. What sort of tractor was it?

A. Well, the first reaction was this——

Q. What sort of tractor was it?

A. Farm tractor.

Q. What size?

A. Well, I would say it was a medium size a farmer would buy without going into the large tractor-type tractors.

Q. And did you see any farm machinery displayed there on more than one occasion?

A. Not prior to that time.

Q. Did you see any thereafter?

A. No, I did not.

(Testimony of S.L. Hjermstad.)

Mr. Hall: You may cross-examine. [370]

* * *

Mr. Hall: The defendant rests, your [371]
Honor.

* * *

DALE COCKAYNE

resumed the stand for plaintiff, and testified as follows:

Direct Examination

By Mr. Williams:

Q. Mr. Cockayne, are you the same Dale Cockayne who has testified previously on two occasions in this trial? A. Yes, sir.

Q. And you are the manager of the Gambles store here in Great Falls, are you not?

A. Yes, sir.

Q. Has the Gambles store in Great Falls ever developed a general wholesale business on the premises known as 521, 523, 525 Central Avenue? [372]

Mr. Hall: Objected to as calling for a conclusion of the witness.

The Court: Sometimes a conclusion is better than to take five or ten minutes to elaborate and go into details and qualify the witness. I will let him answer the question.

A. No, sir, we have not.

Q. Your store records are in evidence here and there are certain figures on those store records which purport to be wholesale sales. I am now handing you Defendant's Exhibit No. 27 and will

(Testimony of Dale Cockayne.)

you tell the court what the nature of those sales which purport to be wholesale sales are on the store records?

A. Those are sales to Gambles stores.

Q. During the time that you have been manager of the Great Falls Gambles store has that store ever made one sale to any person on a wholesale basis which was not another Gambles store?

A. Yes, we have but it would not show up in that column on the statement. We would take a mark down on the merchandise and it would appear as regular retail sale as far as the statement is concerned.

Q. Now you are talking about a mark down sale, are you not? A. Yes, sir.

Q. I am asking you if you have ever made a wholesale sale [373] during the time that you have been manager to anyone other than another Gamble store? A. No, sir, we have not.

Q. Now I believe that sometime during the year 1948 Mr. Chester McNair asked you for some information relating to sales figures, is that correct?

A. That is correct.

Q. And did you give him those sales figures?

A. Yes, sir, I did.

Q. Since that time has he ever asked you for any sales figures?

A. I believe one other time.

Q. And did you give him the figures the other time? A. Yes, sir, I did.

Q. Has any representative from the defendant

(Testimony of Dale Cockayne.)

ever made a request to examine your sales records prior to October 3rd, 1949?

A. Just that one time and they were given them.

Q. And you state that one time there was a request and it was granted?

A. Yes, sir, that is true.

Q. Has there ever been a writing served on you requesting or demanding access to your sales records?

A. No, sir, there has not.

Q. What were your general relations with Mr. Chester McNair and Mr. Ben McNair? [374]

A. As far as myself is concerned they were always very good I thought.

Q. And if they had requested or demanded access to the books, would you have granted that access?

A. Yes, sir, I would have.

Q. Do you know if the plaintiff has a company policy of granting or denying access of the books to the landlord?

A. Yes, they have.

Q. And what is that policy?

A. To let them see them if they so desire.

Q. At any time have you ever refused to let the defendant or any of its officers inspect your sales records?

A. No, sir, I have not.

Q. At any time have you ever refused to let the defenadnt or any of its representatives have whatever files they want or wholesale sales or farm store sales or other sales?

A. No, sir, I have not. [375]

(Testimony of Dale Cockayne.)

Cross-Examination

* * *

By Mr. Hall:

Q. Now you told Mr. Williams on direct examination about these, this wholesale business as shown by the store records, and I believe your testimony is that the store records so far as wholesale sales are concerned reflect sales to other Gamble stores? A. Yes, that is true.

Q. And I believe you told me on cross-examination the other day that the Gambles stores that you had reference to were the stores in the smaller towns? A. That is true.

Q. Operated by individuals are not affiliated at all with Gamble-Skogmo?

A. Well they are affiliated to the point that they are under contract, Mr. Hall.

Q. Well what is that?

A. It is an associated store. [377]

Q. Well, by associated store you mean, do you not—— A. Franchise store.

Q. They are permitted to use the name Gamble?

A. Yes, sir.

Q. Is there any other name attached to that?

A. No, sir.

Q. And the fact of the matter is that Gamble-Skogmo has no interest in that store, has it?

A. That is a pretty hard question to answer. We have no dollar and cent interest, no.

Q. I didn't hear you?

A. We have no dollar and cent interest.

(Testimony of Dale Cockayne.)

Q. No financial stake in any of those stores?

A. Some we do have where we have trust notes.

Q. That would be in cases where you would loan them money to set them up in business?

A. Yes, sir.

Q. But, as I understood you in your other examination, the wholesale figures shown upon these store records do not include any sales made to regular Gambles stores such as we have in Billings and Havre and perhaps—is that all you have?

A. Let's use the term branch stores.

Q. Branch stores?

A. Yes, that is true. [378]

Q. There's the three of them?

A. There's two types of stores, branch store and a dealer store.

Q. And you are branch stores?

A. Yes, sir.

Q. Owned directly by Gamble-Skogmo?

A. Yes.

Q. And located in Great Falls, Havre and Billings?

A. Yes, sir.

Q. And other stores are all franchise stores or dealer stores?

A. Most of them. We have stores in Missoula, Kalispell, Glendive, Miles City and Glasgow; outside of those it would be a dealer store, yes.

Q. But none of those branch stores sales and transfers or merchandise to the branch stores do not show in your store records as wholesale sales?

A. Absolutely right.

(Testimony of Dale Cockayne.)

Q. All the accountings that were made under the lease of December 27, 1943, and all of the letters of transmittal of checks for rent under that lease originated out of Minneapolis, did they not?

A. Yes, sir.

Q. You don't pay the rent here at Great Falls?

A. No, sir.

Q. Nor do you yourself prepare those accountings upon which the rent is based?

A. They are prepared—we cause them to be prepared. We [379] don't make that statement here in Great Falls, no, sir.

Q. I understand that but presumably at least the data supplied by your store after going through several hands forms the basis for the accountings made by the Minneapolis office?

A. Yes, sir.

Q. Or at least then paid?

A. Yes, sir.

Mr. Hall: I think that is all.

Redirect Examination

By Mr. Williams:

Q. I believe you stated that the dealer stores are also called Gamble stores and that they have, and that there is a contract between them and Gamble-Skogmo, Inc.?

A. Yes, sir.

Q. In general without giving the details what does that contract cover?

A. Well the purchase of our goods, the purchase of goods mainly and supervision and so forth along that line.

(Testimony of Dale Cockayne.)

Q. In other words, they purchase Gamble's products?

A. Yes, sir, and services and so on and so forth.

Q. Do they have priority on purchasing Gamble products?

A. Yes, I would say that they do have.

Q. Are they entitled to purchase Gambles products at wholesale prices? A. Yes, sir. [380]

Q. And is that a cost price without profit to the Gamble branch store?

A. The way a branch store has to handle it it is.

Q. Does this particular Great Falls department store make a profit on these transfers of merchandise to other Gambles stores?

A. No, you lose money on it.

Q. And by that you refer to the transfer of merchandise or the sale of merchandise to the dealer stores?

A. That is right. If you were equipped as a warehouse as the warehouses are equipped it is a profitable business but you can't make money on it doing retail business.

Mr. Williams: That is all.

Recross-Examination

By Mr. Hall:

Q. The local store may lose money, Mr. Cockayne, but Gamble-Skogmo makes money on the transaction, does it not? A. No.

Q. I say they make no money then as far as dealer stores are concerned?

(Testimony of Dale Cockayne.)

A. Not if they purchase their merchandise through branch stores they wouldn't, Mr. Hall.

Q. The merchandise that is delivered to the dealer stores [381] by you comes off of your shelves, does it not? A. Yes, sir.

Q. And the goods are paid for to you?

A. Yes, sir.

Q. By the dealers? A. Yes, sir.

Q. And are reflected in your wholesale items and in the store records?

A. Yes, sir, that is true.

Mr. Hall: That is all.

Mr. Williams: That is all.

Mr. Williams: Call Mr. William Hill.

WILLIAM T. HILL

resumed the stand and testified as follows:

Direct Examination

By Mr. Williams:

Q. What is your name?

A. William T. Hill.

Q. Are you the same William T. Hill who previously appeared as a witness in this action?

A. Yes, sir.

Q. I believe you testified that you are in charge of the lease department of the plaintiff; is that right? A. Yes, sir.

Q. As such do you have access to the records of the headquarters office in Minneapolis?

A. Yes, sir. [382]

(Testimony of William T. Hill.)

Q. Do those records show where the Great Falls department store has developed a general wholesale business?

Mr. Hall: Where are the records?

Mr. Williams: Is that an objection?

Mr. Hall: Yes, I am going to object to it as not the best evidence. You are asking, as I understand it, something about records.

The Court: Yes, the records in reference to it should be available for examination.

Q. (By Mr. Williams): Mr. Hill, are you familiar with the system of accounting used by the Great Falls Gambles store? A. Partially.

Q. I hand you this record marked Defendant's Exhibit 27. Are you familiar with that record and the way it is obtained? A. Yes, sir.

Q. That record is obtained in the normal course of business of the plaintiff, is it not?

A. That is correct, yes, sir.

Q. Do those records disclose whether or not the plaintiff has developed a general wholesale business in Great Falls, Montana?

A. Well, they indicate it is not a general wholesale business.

Q. As manager of the lease department you carry on most [383] of the correspondence with the landlords, do you not? A. That is correct.

Q. Prior to the date of October 3rd, 1949, has there ever been a demand made upon your department or upon the plaintiff by the defendant to have access to the store records? A. No, sir.

(Testimony of William T. Hill.)

Q. Prior to October 3rd, 1949, was there ever a demand made by the defendant to the plaintiff that the records be audited? A. No, sir.

Q. Prior to the deposition of Mr. Cockayne, which was originally set for October 19th, 1949, was there ever any demand to have the books subpoenaed by the defendant? A. No, sir. [384]

* * *

Cross-Examination

By Mr. Hall:

Q. Was that policy ever communicated by you to Mr. McNair?

A. No, sir, it wasn't, Mr. Hall.

Q. Now I am not sure that I understand you when you say that no demand to have the books subpoenaed was ever made by the defendant; what do you mean by that?

A. Prior to October 3rd?

Q. Yes.

A. I already answered the question, Mr. Hall.

Q. What is that?

A. I already answered the question.

Q. And your answer was no such demand to have the books subpoenaed was made by the defendant? [385] A. Well, that is correct.

Q. Demand upon whom?

A. On the retail store.

Q. Subpoenaes are issued out of court, are they not? A. Correct.

(Testimony of William T. Hill.)

Q. What is it about these store records which you had examined in your direct examination that shows that Gambles has not developed a general wholesale business here?

A. By the figures which I have examined. The figures which I have examined.

Q. And do you mean by that the amounts?

A. The amounts.

Q. In other words, you figure that to develop a general wholesale business, something over \$40,000.00 a year should be developed?

A. Not necessarily.

Q. Well, what is the limitation?

A. We are not engaged in the wholesale business through our retail stores.

Q. But you looked into the record that Mr. Williams handed to you and said that the records disclosed that? A. That is correct.

Q. And I say, or what about that that discloses the fact to you?

A. Well, each operation is clearly defined by those records. [386]

* * *

Mr. Williams: Plaintiff rests, your Honor.

Mr. Hall: Defendant rests.

Mr. Williams: At this time, on behalf of the plaintiff, we move the court for a judgment and entry of judgment for the plaintiff and against the defendant upon the grounds and for the reasons that the evidence and the law in this case justify

the plaintiff in having a judgment in accordance with the prayer of its complaint on file herein.

Mr. Hall: A similiar motion for the record is made on behalf of the defendant that the action be dismissed at [387] plaintiff's costs. [388]

CLERK'S CERTIFICATE

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 442 pages, numbered consecutively from 1 to 442, inclusive, constitutes a full, true and correct transcript of all portions of the record in case No. 1195, Gamble-Skogmo, Inc., a corporation, vs. McNair Realty Company, a corporation, designated by the parties as the record on appeal and on cross-appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that pursuant to the direction contained in Appellee's Designation of Contents of Record on Cross-Appeal, I transmit herewith, as a part of the record on appeal and cross-appeal, original Exhibits Nos. 8, 9, 10, 11, 12, 13, 14 and 15, which were offered by the defendant and received in evidence at the trial of said cause.

I further certify that the costs of said Transcript of Record on Appeal amount to the sum of Forty-nine and 30/100ths (\$49.30) Dollars, and that said costs have been paid by the parties as follows, to wit: the sum of \$31.70 by Appellant, McNair Realty Company, and the sum of \$17.60 by Appellee, Gamble-Skogmo, Inc.

Witness my hand and the seal of said Court at Great Falls, Montana, this 12th day of May, A.D. 1951.

[Seal]

H. H. WALKER,

Clerk as Aforesaid.

By /s/ C. G. KEGEL,

Deputy Clerk. [442]

[Endorsed]: No. 12944. United States Court of Appeals for the Ninth Circuit. McNair Realty Company, a Corporation, Appellant, vs. Gamble-Skogmo, Inc., a Corporation, Appellee, vs. Gamble-Skogmo, Inc., a Corporation, Appellant, vs. McNair Realty Company, a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Montana.

Filed May 22, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12944

McNAIR REALTY COMPANY, a Corporation,
Appellant and Cross-Appellee,

vs.

GAMBLE-SKOGMO, INC., a Corporation,
Appellee and Cross-Appellant.

STATEMENT BY GAMBLE-SKOGMO, INC., A
CORPORATION, OF POINTS ON APPEAL
TO BE RELIED UPON BY APPELLEE
AND APPELLANT ON CROSS-APPEAL

The Appellee and Appellant on Cross-Appeal above named, Gamble-Skogmo, Inc., a corporation, through its counsel of record, hereby adopts for its statement of points upon which it intends to rely upon this appeal, the Designation of Points to Be Relied Upon by Appellee and Appellant on Cross-Appeal heretofore, and on the 17th day of April, 1951, filed with the Clerk of the United States District Court for the District of Montana, and served upon counsel for Appellant and Cross-Appellee, and certified by said District Court Clerk to the Clerk of the United States Court of Appeals for the Ninth Circuit, and hereby respectfully requests that said statement of points be allowed and filed pursuant to Rule 19 of this Court.

Dated June 1, 1951.

GAMBLE-SKOGMO, INC.,
A Corporation,
Appellee and Appellant on
Cross-Appeal.

By /s/ I. W. CHURCH,
/s/ G. G. HARRIS,
/s/ BJARNE JOHNSON,
/s/ CARTER WILLIAMS,
Its Attorneys.

Service of Copy acknowledged.

[Endorsed]: Filed June 4, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT BY McNAIR REALTY COM-
PANY, A CORPORATION, OF POINTS
ON APPEAL TO BE RELIED UPON BY
APPELLANT

The Appellant above named, McNair Realty Company, a corporation, through its counsel of record, hereby adopts for its statement of points upon which it intends to rely upon this appeal, the statement of points to be relied upon by Appellant heretofore and on the 4th day of April, 1951, filed with the Clerk of the United States District Court for the District of Montana, and served upon counsel for Appellee, and certified by said District Court

Clerk to the Clerk of the United States Court of Appeals for the Ninth Circuit, and hereby respectfully requests that said statement of points be allowed and filed pursuant to Rule 19 of this Court.

Dated June 1, 1951.

McNAIR REALTY COMPANY,
A Corporation,
Appellant.

By /s/ H. C. HALL,

/s/ EDW. C. ALEXANDER,
Its Attorneys.

Service of Copy acknowledged.

[Endorsed]: Filed June 4, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION OF PARTIES DESIGNATING
PARTS OF RECORD TO BE PRINTED
FOR USE ON APPEAL

It Is Hereby Stipulated, by and between the above-named parties, through their respective counsel, that the portions of the Record of the District Court of the United States for the District of Montana, in said cause heretofore designated by the respective parties, which designation and record have been heretofore certified to the Clerk of the United States Court of Appeals for the Ninth Circuit, are hereby designated as the portions of the

record which are material to the consideration by this Court of the appeal and cross-appeal herein, and as such shall be printed by the Clerk of this Court.

Dated June 1st, 1951.

McNAIR REALTY COMPANY,
A Corporation,

By /s/ H. C. HALL,
/s/ EDW. C. ALEXANDER,
Its Attorneys.

GAMBLE-SKOGMO, INC.,
A Corporation,

By /s/ I. W. CHURCH,
/s/ G. G. HARRIS,
/s/ BJARNE JOHNSON, and
/s/ CARTER WILLIAMS,
Its Attorneys.

[Endorsed]: Filed June 4, 1951.